Michele Maltese*

COURT-TO-COURT PROTOCOLS IN CROSS-BORDER BANKRUPTCY PROCEEDINGS: DIFFERING APPROACHES BETWEEN CIVIL LAW AND COMMON LAW LEGAL SYSTEMS

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* Bank of Italy, Supervisory Department. Ph.D. Candidate, Università di Roma "Tor Vergata", Law School (Rome, Italy); LL.M. New York University School of Law 2011. Admitted to the Rome Bar; admission pending to the New York State Bar.
The views expressed in this paper are those of the author and shoul not be attributed to the Bank of Italy.

Abstract

While the theoretical debate over cross-border insolvency is still divided between supporters of a universalist paradigm and those of a territorialism model, a wide consensus seems to exist on the conclusion that cooperation among foreign courts and insolvency representatives is needed to enhance the efficiency of the process and avoid deadlocks and transnational conflicts among parallel insolvency proceedings. Bankruptcy protocols are one of the most advanced tools to implement cross-border cooperation in cross-border insolvency and their use has been expressly advocated by existing legislation, including the UNCITRAL Model Law and the European Union Regulation no. 1346/2000 on cross-border insolvency proceedings. Recourse to bankruptcy protocols and the contents thereof have historically been influenced by the legal context in which they were adopted. In particular, while protocols are widely adopted by courts in common law legal systems (in particular, the U.S., the U.K and Canada), the same does not hold true for continental European countries.

The goal of this paper is to analyze the use of protocols in cross-border insolvency proceedings in the context of domestic bankruptcy legislation. The introductory section of the paper describes the emphasis that theoretical and legislative elaborations on cross-border insolvency put on court-to-court cooperation. The first part of the paper is devoted to the illustration of how bankruptcy protocols represent an implementation of this principle of court-to-court cooperation both from historical and a practical point of view. The second and the third part of the paper analyze how protocols are implemented, respectively, in common law and in civil law countries and attempt to draw some conclusions on the relationship between the domestic legal context and recourse to protocols.

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I. Introduction: The Need for Cooperation in Cross-Border Insolvency

1. The traditional debate between universalist and territorial conceptions of cross-border insolvency

Scholars have traditionally identified two primary, opposite approaches toward cross-border insolvency proceedings. Although the general framework of cross-border-insolvency law has deeply evolved over the last twenty years, universalism and territorialism continue to occupy the two opposing ends of a theoretical spectrum that embraces all potential attitudes toward international insolvency. These approaches still serve as inescapable doctrinal reference points for courts and legislators, even though in practice other intermediate approaches are generally adopted.

Universalism is premised on the idea that the insolvency of a multinational debtor should be treated as a single bankruptcy case that incorporates all of the assets and claims, irrespective of their location.[1] This single, universal bankruptcy case should collect and manage all of the debtor's assets worldwide, provide for the reorganization or the liquidation of the debtor's estate, and offer equal treatment to all creditors. This case should also be governed by a single legal regime under a unified set of procedural rules administered by one bankruptcy court. Accordingly, under the universalist approach, the ultimate objective of cross-border insolvency is to identify the appropriate court for the administration of such a universal bankruptcy case.

The territorialisit approach offers the contrary view. Rather than advocating a single bankruptcy case with an universal scope, terrorialism argues that independent insolvency proceedings should be opened in every jurisdiction in which the debtor's assets are located and that each of these should governed by the respective domestic bankruptcy regime.[2] This framework would avoid conflicts among

[1] *See*, *inter alia*, Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000); Jay L. Westbrook, *Universalism and Choice of Law*, 23 PENN S. INT'L L. REV., 625 (2003); Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of The Modified Universal Approach Considering The Japanese Experience* 21 U. PA. J. INT'L ECON. L. 679 (2000); Andrew T. Guzman, *International Bankruptcy: In Defence of Universalism* 98 MICH. L. REV. 2177 (2000); Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787 (2000); Edward S. Adams & Jason Finke, *Coordinating Cross-border Bankruptcy: How Territorialism Saves Universalism* 15 COL. J. EUR. LAW 43(2008). A more nuanced version of the universalist approach is suggested by Hannah L. Bauxman, *Rethinking International Insolvency: The Neglected Choice-of-Law Rules and Theory*, 36 STAN. J. INT'L L. 23 (2000).

[2] *See, inter alia,* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL

jurisdictions, as the effects of each national bankruptcy case would be confined solely to the assets located within the territorial scope of the jurisdiction in which the case is opened. Accordingly, supporters of the territorialist approach argue that the main goal of cross-border insolvency law should be to provide a common set of rules aimed at the unequivocal identification of the locations of the debtor's assets and the bases for establishing territorial bankruptcy jurisdiction.

As merely theoretical doctrines, both universalism and territorialism have distinctive strengths and weakness.

Historically, territorialism was the most commonly adopted model of cross-border insolvency law. This is due to its reliance on national sovereign jurisdiction and its realistic approach towards the issues of international comity and cooperation in the handling of bankruptcy cases.[3] However, territorialism's propensity to self-sufficiency produces significant negative side-effects on the economic efficiency of the insolvency process, since it postulates that each jurisdiction handles only a portion of the bankruptcy case as a stand-alone fashion as a separate bankruptcy estate.[4] Accordingly, almost by definition, territorialism is ill suited both to solving the issues of collective action that normally arise in the context of bankruptcy proceedings and to maximizing the value of the debtor's entire enterprise.[5] Moreover, the proliferation of national bankruptcy proceedings according to a territorialist approach inevitably increases transaction costs, thereby reducing the efficiency of the process. Finally, territorialism jeopardizes the fair distribution of the debtor's assets to creditors, because distribution is administered according to the arbitrary location of the assets at the moment of commencement of the bankruptcy case; additionally unfair is the naturally inferior position of foreign compared to local creditors, since the former tend to be unaware of local bankruptcy processes.

According to some law-and-economic scholars, the side-effects arising from the territorialist approach operate as *ex ante* disincentives to lending activity, thereby reducing the general efficiency of the credit market.[6] This perspective instead favors the universalist approach, because universalism would ensure a more economically efficient outcome by virtue of its higher predictability and lower

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L. REV. 696 (1999); Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy* 98 Mich. L. Rev., 2216 (2000); Fredrick Tung, *Fear of Commitment in International Bankruptcy* 33 GEO. WASH. INT.'L L. REV. 555, (2001).

3 BOB WESSELS, BRUCE A. MARKELL & JASON J. KILBORN, INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS 43 (Oxford University Press, 1st ed. 2009); IRIT MEVORACH, INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUP 37 (Oxford University Press, 1st ed. 2009).

4 Jay L. Westbrook, *A Global Solution to Multinational Default, supra* note 1, at 2309.

5 For a theoretical analysis of the goals of the bankruptcy process *see, inter alia*, THOMAS H. JACKSON, THE LOGIC AND LIMIT OF BANKRUPTCY LAW (Harvard University Press, 1st ed. 1986).

6 Lucian A. Bebchuck & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. L. & ECON. 775 (1999).

transaction costs. Moreover, under a merely legal perspective, the idea of universalism corresponds to the traditional view of the bankruptcy process as a collective legal mechanism, which consolidates creditors' claims and debtor's assets into a single procedure governed by a single set of rules. Accordingly, if a debtor operates in a single international market, its bankruptcy should be managed in a single proceeding encompassing all its assets worldwide.[7]

However, although theoretically more economically efficient, the universalist model is often criticized for its purported lack of political and legal realism. Indeed, this model postulates an international consensus among all countries involved in a cross-border insolvency case with respect, at least, to the rules on both: (i) the identification of the forum that should have exclusive and universal jurisdiction over the bankruptcy case and (ii) recognition and enforcement of such a forum's decisions worldwide. Absent these conditions, each country involved in the proceeding might affirm its own jurisdiction or refuse to recognize or enforce the decisions adopted in the universal procedure, thereby undermining the principle of unity of the cross-border insolvency proceeding. Accordingly, given the great differences among goals and structures of the existing national bankruptcy laws and cultures, as well as the traditional reluctance of states to relinquish their sovereign prerogatives, the achievement of worldwide uniformity of rules on jurisdiction is unlikely.

2. Hybrid models of cross-border insolvency proceedings as compromise solutions.

In an effort to address the criticisms illustrated above, some scholars have edeveloped hybrid models of cross-border bankruptcy proceedings, which aim at combining the advantages, and avoiding the disadvantages, of the two extreme theoretical positions of universalism and territorialism.

Supporters of the universalist approach have proposed the so-called "modified universalism" model, which has been described as "universalism tempered by what is practical at the current stage of international legal development."[8] This model combines a single bankruptcy case of universal scope, or the so-called main proceeding, with local proceedings that have limited territorial jurisdiction over assets and claims situated in their respective territories. In these so-called secondary proceedings, the courts supervising the secondary proceedings can opt either to enforce, within their territory, the decisions adopted in the main proceeding or, to open parallel bankruptcy cases exclusively limited to the assets falling under their territorial jurisdiction.[9] The distinctive feature of this model is the

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7 Jay L. Westbrook, *A Global Solution to Multinational Default, supra* note 1, at 2292.

8 Emilie Beavers, *Bankruptcy Law Harmonization in the NAFTA Countries: The Case for the United States and Mexico*, COLUM. BUS. L. REV. 965 (2003).

9 Jay L. Westbrook, *A Global Solution to Multinational Default, supra* note 1, at 2300.

coordination by the courts of the main and secondary proceedings in order to ensure a coherent outcome of the case and to avoid the artificial partitioning of the bankruptcy estate or the unequal treatment of creditors.

Accordingly, in this framework, cooperation among courts should allow the coexistence of multiple proceedings with respect to the same debtor, while simultaneously ensuring the identical economic result of a case based on a pure universal approach.[10] Thus, modified universalism provides efficiency only to the extent that it ensures adequate coordination between the main and secondary proceedings. Indeed, if courts are unwilling to or incapable of cooperating, the debtor's estate would be fragmented into several, non-communicating national bankruptcy estates, thus producing an outcome that would not significantly differ from that under a territorialist model.[11] In order to avoid this result, modified universalism, like pure universalism, similarly requires a broad international consensus on the criteria to establish [main and secondary] jurisdiction[s] and the procedures for the coordination of parallel bankruptcy proceedings.

Likewise, supporters of territorialism have proposed an amended version of their model, which is heavily premised upon court-to-court cooperation. Specifically, the strongest supporter of territorialist, Professor LoPucki, has proposed a "cooperative territorialist" paradigm,[12] in which, similar to a pure territorialist approach, each country should be entitled to open a bankruptcy case limited to the assets of a multinational debtor located in its territory for the benefit of local creditors only. The distinctive feature of this modified approach is represented by the cooperative attitude that each jurisdiction should assume *vis-à-vis* the others. In particular, cooperation among national bankruptcy proceedings should be carried out mainly through: (i) procedures aimed at replicating claims filed in a bankruptcy proceeding in all the other proceedings; (ii) the sharing of lists of the distributions made to local creditors, in order to avoid double recovery; (iii) procedures for joint sales of the debtor's assets, if deemed more efficient than separate sales; (iv) voluntary contributions by creditors in one country to the debtor's reorganization efforts in other countries; and (v) procedures for

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[10] Commentators have emphasized the realist approach of this model, noting that "one advantage of […] modified universalism is that it retains some of the efficiencies of pure universalism while incorporating the flexibility and discretion of the […] territorial approaches described above." Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of The Modified Universal Approach Considering The Japanese Experience, supra* note 1, at 691.

[11] Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies, supra* note 1, at 732.

[12] Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, *supra* note 2, at 753; *see also* Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV., 2216, 2218 (2000); LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS, (University of Michigan Press, 1st ed. 2005); Lynn M. LoPucki, *Global and Out of Control*, 79 AM. BANKR. L. J. (2005).

the restitution of assets in claw-back actions.[13] Accordingly, while preserving, to the greatest extent possible, national sovereign prerogatives with respect to domestic bankruptcy cases, cooperative territorialism should nonetheless maximize the value of the debtor's business by avoid artificial partitioning and by preserving its value as an ongoing concern.

Thus, although traditionally representing opposite theories of the cross-border insolvency process, universalism and territorialism have in practice progressed toward a convergence, in the form of hybrid versions that heavily rely on cooperative mechanisms among courts and debtor's representatives in national bankruptcy proceedings in order to ensure the efficient outcome of the cross-border insolvency case.

3. Legislation adopting a hybrid approach

Until recent years, cross-border bankruptcy had not specifically been addressed by international legislators, with the notable exception of those provisions inserted in bilateral treaties for the protection of investment through cooperation in bankruptcy matters among the signatories.[14] Traditionally, territorialism was the most commonly adopted approach, and recognition and enforcement of foreign bankruptcy court orders were traditionally not contemplated in bankruptcy legislations.[15] However, the increase of global commerce and the general trend favoring international comity among courts have led to important developments in cross-border bankruptcy law. The most notable of these is the enactment of two pieces of legislation at the supranational level: the Regulation No. 1346 on Cross-border Insolvency Proceedings adopted by the European Union in 2000 (hereinafter the E.U. Regulation)[16] and the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on

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[13] Lynn M. LoPucki, *Universalism Unravels,* 79 AM. BANKR. L. J. 143, 162 (2005).

[14] *See* BOB WESSELS, BRUCE A. MARKELL & JASON J. KILBORN, *supra* note 3, at 71. A collection of treaties addressing bankruptcy issues is included in Kurt H. Nadelman, *Bankruptcy Treaties,* 93 PENN. L. REV. 58, 61 (1944).

[15] In particular, in the United States, prior to the enactment of the first national bankruptcy law in 1898, resistance to enforcement of foreign bankruptcy courts' orders was supported by a famous quote of U.S. Supreme Court Chief Justice Marshall, according to whom "the bankruptcy law of a foreign country is incapable of operating a legal transfer of property in the United States." *Harrison v. Sterry*, 9 U.S. 289, 302 (1809).

[16] The E.U. Council Regulation (EC) no. 1346/2000 of May 29, 2000 is a binding piece of legislation directly applicable in all member states of the European Union for all bankruptcy proceedings opened in any of those states. In general, on E.U. Regulation, see, *inter alia*, the official report by Miguel Virgos & Etienne Schmidt, Report on the Convention on Insolvency Proceedings, EU Council Doc. 6500/96, DRS 8 (EFC) para. 70 (May 3, 1996), *available at* http://aei.pitt.edu/952/01/insolvency_report_schmidt_1988.pdf (last visited March 30, 2013); MIGUEL VIRGOS & FRANCISCO GARCIAMARTIN, THE EC REGULATION ON INSOLVENCY PROCEEDINGS: LAW AND PRACTICE (Kluwer Law International, 1st ed. 2004); GABRIEL MOSS, IAN F. FLETCHER & STUART ISAACS, THE EC REGULATION ON INSOLVENCY PROCEEDINGS. A COMMENTARY AND ANNOTATED GUIDE (Oxford University Press, 2nd ed. 2006); BOB WESSELS, EUROPEAN UNION REGULATION ON INSOLVENCY PROCEEDINGS: AN INTRODUCTORY ANALYSIS (American Bankruptcy Institute, 3rd ed. 2009); KLAUS PANEL (ED.), EUROPEAN INSOLVENCY REGULATION (DeGruyter Recht, 1st ed. 2007).

International Trade Law (UNCITRAL) in 2004 (hereinafter the Model Law) and implemented by several countries, including the United States.[17]

Both pieces of legislation adopt a hybrid model of cross-border bankruptcy proceedings, in which—as scholars have remarked—the modified universalism approach is arguably predominant.[18] Indeed, the whole approach of both the Model Law and the E.U. Regulation is premised upon the distinction between foreign main proceedings, and foreign non-main (as they are called in the Model Law), or secondary (the terminology of the E.U. Regulation), proceedings. A foreign bankruptcy case is deemed to be the main proceeding if it has been commenced in the State in which the debtor has the center of its main interests (COMI),[19] whereas non-main, or secondary, proceedings are those taking place in a State in which the debtor has an establishment, defined as "a place of operations where the debtor carries out a non-transitory economic activity with human means and goods".[20]

The hybrid approach adopted by the two pieces of legislation is evidenced in that, while main

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[17] The Model Law is a non-binding piece of legislation adopted by a commission of experts under the aegis of the UNCITRAL. It contains unilateral provisions regarding cross-border insolvency matters and it is indicated as a model that national legislators can unilaterally implement in their legal systems in order to harmonize their cross-border bankruptcy legislation. The Model Law has been adopted by several countries, including Japan (2000), Mexico (2000) Poland (2003) Rumania (2003), South Africa (2000), Canada (2005) and United Kingdom (2006). Also the United States has enacted the Model Law, by introducing in 2005 a the Chapter 15 in the U.S. Bankruptcy Code, reflecting almost word by word the UNCITRAL soft-law statute. In general on the Model Law, *see* UNCITRAL, *Guide to Enactment of the Model Law*, *available at* www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited March 30, 2013) [hereinafter UNCITRAL, *Official Guide to Enactment*]. On U.S. Bankruptcy Code Chapter 15 *see, inter alia*, Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases* 82 Am. Bank. L. J., 269 (2008); Kevin J. Beckering, *United States Cross-Border Corporate Insolvency: The Impact of Chapter 15 on Comity and the New Legal Environment* 14 L & BUS. REV. AM. 281 (2008); Francis G. Conrad & Richard J. Corbi, *Cross-Border Bankruptcy Update: Do U.S. Bankruptcy Courts Have the Final Say?* ABI JOUR. 42 (July/August 2008); Ken Colemand & Dan Guyder, *United States-Canadian Restructuring: Finding COMI with a sense of Comity* 2 INTERNATIONAL AND RESTRUCTURING INTERNATIONAL 21 (Sept. 2008); Jay L. Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles and the EU Insolvency Regulation* 76 AM. BANK. L. J., 17 (2002); Jay L. Westbrook, *Chapter 15 and Discharge* 13, AM. BANK. INST. L. REV. 503 (2005); Daniel Glosband, *US Looks to Global Insolvency Model* INT'L FIN. L. REV. 1 (2005); Bruce Bell & Brandon Ziegler, *Chapter 15 of the US Bankruptcy Code: Some Observations from a UK Perspective* 2 INT'L CORP. RESCUE 216 (2005); Daniel B. Glosband, *Bear Sterns Appeal Decision*14 INSOL World (2008); Fred S. Hodara, Lisa G. Beckering & Brian D. Geldert, *Chapter 15 and the UNCITRAL Model Law: Narrowing the US Approach to International Judicial Cooperation?* 36 THE AMERICAS RESTRUCTURING AND INSOLVENCY GUIDE (2008/2009); Andy Soh, *Chapter 15 of the U.S. Bankruptcy Code: An Invitation to Forum Shopping?* 16 NORTON J. BANK. L & PRAC. (2007).

[18] For a discussion see P. Michael Veder, *Cross-Border Insolvency Proceedings and Security Rights. A comparison of Dutch and German Law, the EC Insolvnecy Regulation and the UNCITRAL Model Law on Cross-Border Insolvency,* 107 *(*Kluwer Legal Publisher, 1st ed. 2004); BOB WESSELS, *supra* note 13, at 75 who proposes the definition of "coordinated universalism."

[19] *See* Article 2(b) of the Model Law (§1502(b) of the U.S. Bankruptcy Code) and Article 3(1) of the E.U. Regulation. While the Model Law does not further define the concept of COMI, the E.U. Regulation provides that "the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary." *See* Article 3(1) of the E.U. Regulation.

[20] Article 2(h) of the E.U. Regulation; *see also* Article 2(f) of the Model Law (§1502(f) of the U.S. Bankruptcy Code) ("[A] place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services").

proceedings are normally universal (i.e., they include all the debtor's assets, irrespective of their location), non-main (or secondary) proceedings are limited to the assets situated in the territory of the opening State.[21] Thus, both the Model Law and the E.U. Regulation enable the State in which the debtor has its COMI to open a main bankruptcy case that has universal effects, unless and until non-main proceedings are commenced in States in which the debtor has an establishment. Moreover, the distinction between main and non-main proceedings is also relevant for recognition and enforcement of foreign bankruptcy decisions: while decisions adopted in the context of a main proceeding—given their universal scope—must also be enforced outside the territorial boundaries of the State in which the debtor has its COMI (unless a local proceeding has been commenced in the state of recognition), the same is not true for those decisions adopted in the context of local proceedings.[22]

The cooperative element embedded in the Model Law and in the E.U. Regulation—which has led scholars to classify these two legislative instruments as hybrid approaches—is evidenced by the fact that both pieces of legislation aim to avoid that parallel bankruptcy cases proceed independently of one another and contain provisions to ensure their coordination and the cooperation between courts and bankruptcy representatives involved. Thus, coordination and cooperation represent two separate, but not entirely unrelated, features of the Model Law and the E.U. Regulation.

While the term "coordination" refers to the legal relationships between main and secondary proceedings (including, e.g., rules on enforcement of foreign bankruptcy decisions, the recognition of claims filed in foreign proceedings, and the disposition of the assets),[23] the concept of "cooperation"

[21] It should be noted, however, that the Model Law and the E.U. Regulation treat differently the effects of non-main (or secondary) proceedings. For instance, under the E.U. Regulation secondary proceedings are necessarily be aimed at liquidation, as opposed to reorganization, of the debtor. *See* Article 3(3) of the E.U. Regulation.

[22] It should be underscored that, while under Article 27 of the E.U. Regulation, the effects of secondary proceedings "shall be restricted to the assets of the debtor situated within the territory of [the State in which the secondary proceeding was opened,]" pursuant to Article 21 of the Model Law foreign courts can discretionally grant bankruptcy reliefs to representatives of non-main proceedings (such as the staying of individual actions and the prohibition to transfer or encumber debtor's properties), thereby extending to their territories the effects of local non-main proceedings.

[23] The approach on coordination of concurrent bankruptcy proceedings adopted by the Model Law is summarized as follows by the Official Guide to Enactment:

> "firstly, any relief to be granted to the foreign proceeding must be consistent with the local proceeding [...]; secondly, any relief that has already been granted to the foreign proceeding must be reviewed and modified or terminated to ensure consistency with the local proceeding [...]; thirdly, if the foreign proceeding is a main proceeding, the automatic effects [arising out from its recognition] are to be modified and terminated if inconsistent with the local proceeding (those automatic effects do not terminate automatically since they may be beneficial, and the court may wish to maintain them) [...]; and fourthly, where a local proceeding is pending at the time a foreign proceeding is recognized as a main proceeding, the foreign proceeding does not enjoy the automatic effects of article 20 [arising out from its recognition.]"

UNCITRAL, *Official Guide to Enactment*, *supra* note 17, at para. 190, referring to Articles 28-32 of the Model Law. The approach adopted by the E.U. Regulation with respect to coordination of parallel proceedings is more complex and is set forth by Articles 27 through 42.

refers to the attitude of courts and representatives toward adopting measures aimed at ensuring that parallel proceedings are conducted in an ordinate manner and produce a coherent outcome. This attitude—which certainly includes, but is not limited to, the duty to share relevant information and to act in good faith for the benefit of all creditors—should supplement the applicable legal provisions aimed at the same objectives and provide a legal foundation for ad hoc intervention of competent authorities on a case-by-case basis.[24] Thus, the duty of cooperation is premised upon the obligation of bankruptcy courts and representatives to interact in good faith with their counterparties in parallel insolvency proceedings in order to jointly address issues of common concern.

Although both the UNCITRAL Model Law and the E.U. Regulation specifically impose a duty of cooperation upon bankruptcy courts and representatives,[25] neither provides a clear definition of this duty.[26] However, provisions on cooperation—albeit succinct and vague—constitute a more or less explicit legal basis for the approval of bankruptcy protocols.[27]

In this respect, Chapter IV of the Model Law (Articles 25-27)[28] mandates that bankruptcy courts and representatives not only communicate and share information concerning the debtor and the proceedings, but also "cooperate to the maximum extent possible." Article 27 of the UNCITRAL Model Law authorizes courts and representatives to implement such a duty to cooperation:

> "[B]y any appropriate means, including:
> (a) appointment of a person or body to act at the direction of the court;
> (b) communication of information by any means considered appropriate by the court;

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[24] *See also* Thomas M. Gaa, *Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?,* 27 INT'L LAWYER 881 (1993); Begum Galip, *A Proper Approach to Cooperation in Cross. Border Insolvency,* 4 INT'L CORP RESCUE 24 (2007).

[25] *See* Article 25 of the Model Law and Article 31 of the E.U. Regulation.

[26] Some scholars have suggested that "cooperation [should be] characterized […] as a paradigm that may function as a platform for the formulation of more detailed and predictable choice-of-law rules and therefore a first step toward more universalism in cross-border insolvency." BOB WESSELS, BRUCE A. MARKELL & JASON J. KILBORN, *supra* note 3, at 70, *citing* JONA ISRAEL, EUROPEAN CROSS-BORDER INSOLVENCY REGULATION. A STUDY OF REGULATION 1346/2000 ON INSOLVENCY PROCEEDINGS IN THE LIGHT OF A PARADIGM OF COOPERATION AND A COMITAS EUROPAEA, 89 (Intersentia, 1st ed. 2005). However, this characterization is not fully convincing, since cooperation in bankruptcy matters often goes beyond choice-of-law issues. Moreover, as discussed above, also supporters of the territorialist model underscore the importance of a cooperative attitude, which, thus, cannot be regarded as a prerogative of the universalist paradigm.

[27] Other macro-regional legal instruments dealing with cross-border bankruptcy issues also contain similar provisions. *See, e.g.*, Article 252 of the 1999 Treaty establishing the Organization for the Harmonization of Business Law in Africa (OHADA) and the 2001 Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement.

[28] According to Official Guide to Enactment, para. 173, the objectives of this Chapter "are to enable courts and insolvency administrators from two or more countries to be efficient and achieve optimal results. Cooperation as described in the chapter is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets (e.g. when items of production equipment located in two States are worth more if sold together than if sold separately or to find the best solutions for the reorganization of the enterprise." UNCITRAL, *Official Guide to Enactment*, *supra* note 17, at para. 173

(c) coordination of the administration and supervision of the debtor's assets and affairs;
(d) approval or implementation by courts of agreements concerning the coordination of proceedings;
(e) coordination of concurrent proceedings regarding the same debtor."

Article 31 of the E.U. Regulation similarly specifies a duty of cooperation. After devoting its first paragraph to the duty to "communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings," provides at paragraph 2 that "[s]ubject to the rules applicable to each of the proceedings, [the bankruptcy representatives] shall be duty bound to cooperate with each other."[29]

These provisions are extremely important for the purposes of the present paper, since they provide a—more or less explicit—legal basis for the approval of bankruptcy protocols. Indeed, the adoption of protocols fits squarely into the definition of cooperation in bankruptcy matters provided above, since they represent a flexible tool—permitted, but not mandated under the applicable law—designed to serve the objectives of cross-border bankruptcy law on a case-by-case basis.

II. Court-to-Court Protocols as a Tool for Cooperation in Cross-Border Insolvency

1. Historical development of protocols

The use of protocols in cross-border bankruptcy cases by courts and practitioners does not date merely from the enactment of the Model Law and the E.U. Regulation. Indeed, the first protocols of the modern era[30] were developed in the U.S. in the early 1990s, when no provision comparable to the current versions of Article 27(d) of the Model Law (as implemented by § 1527(4) of the U.S. Bankruptcy Code) existed.

As will be shown below in greater detail, the history of protocols is mainly a U.S. and Canadian one. Accordingly, this section first discusses the long and rich historical evolution of protocols in these and other (mostly common law-based) countries since 1991. Then, it briefly describes the considerably less developed use of bankruptcy protocols in continental Europe and other civil law-based legal

[29] Moreover, recital no. 20 of the E.U. Regulation closely connects the principle of coordination of the proceedings, the duty to cooperate and to exchange information by stating that "[m]ain insolvency proceedings and secondary proceedings can, however, contribute to the effective realization of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various *liquidators must cooperate closely, in particular by exchanging a sufficient amount of information.*" E.U. Regulation, recital no. 20 (emphasis added).

[30] While there is evidence of the use of bankruptcy protocols in Medieval Europe, this paper discusses solely the use of protocols in the modern era, i.e. the 20th and 21st centuries.

systems, before turning to the analysis of their contents in the next part of this paper.

a. The Maxwell era protocols.

The first use of bankruptcy protocols can be found in the *Maxwell* case, commenced in 1991.[31] Maxwell Communication Corporation plc was the British holding company of the multinational Maxwell Group, composed of several subsidiaries with most of their assets in the U.S. Following the mysterious disappearance of Mr. Maxwell and the subsequent financial crisis of the Group, the British holding company filed a Chapter 11 petition before the New York Bankruptcy Court, seeking bankruptcy relief under the most debtor-friendly legislation, which, contrary to the applicable U.K. bankruptcy law, allowed the management to remain in control of the business as a debtor in possession. At the same time, however, creditors initiated a parallel bankruptcy proceeding before the High Court, Chancery Division, in London. This court duly appointed three administrators and ordered Maxwell Group's directors to dismiss the U.S. Chapter 11 case under penalty of severe criminal sanctions. Since both the U.S. and the U.K. proceedings had universal scope under the applicable domestic bankruptcy laws, a substantial jurisdictional clash was imminent. In order to avoid this clash and coordinate the two bankruptcy cases, the U.S. debtor in possession (assisted by an neutral examiner appointed by the New York Bankruptcy Court) and the British administrators eventually entered into a protocol, which was then approved by the two courts involved in the matter.[32]

The protocol's main goal was to reshape the corporate governance of the Group. This was to be accomplished through the redefinition of the respective spheres of competences of the U.K. administrators and the U.S. managers, in order to allow the former to gain control on the estate, while keeping the latter in place for major business decisions. Thus, the U.K. administrators were recognized as the exclusive directors of the British parent company, and the U.S. managers remained as debtor in possession of the U.S. subsidiaries. U.K. and U.S. representatives agreed to, in good faith, seek to obtain prior approval from the counterpart with respect to any relevant operation within their powers.

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31 *See In re* Maxwell Comm. Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994) and [1992] B.C.L.C. 465. For a description of the circumstances leading to the approval of the Maxwell protocol, see Evan D. Flaschen, *How the Maxwell Sausage was Made*, 34 INSOL WORLD (2007); Evan D. Flaschen & Romand J. Silberman, *Cross-Border Insolvency Cooperation Protocols*, 33 TEX. INT'L L. J. 587 (1998); Evan D. Flaschen & Romand J. Silberman, *The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communications Corporation International Insolvency,* in E. BRUCE LEONARD (ED.), CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW, 621 (Oxford University Press, 1st ed. 1995); Jay L. Westbrook, *The Lessons of Maxwell Communications,* 64 FORDHAM L. REV. 2531 (1996); John A.E. Pottow, *The Maxwell Case*, in R. RASMUSSEN (ED.), BANKRUPTCY LAW STORIES, 222-237 (Foundation Press, 1st ed. 2007).

32 The text of the protocol of the Maxwell case, as well of all other protocols mentioned in this paper (unless otherwise indicated) can be found at the following website: www.iiiglobal.org, last visited March 30, 2013.

The protocol did not address issues of asset distribution to creditors, but it set forth the duty upon the parties to consult with each before proposing "essentially similar arrangements" for a plan of reorganization under U.S. and U.K. laws. Ultimately, as the U.S. Court of Appeals for the Second Circuit noted, the joint efforts of the U.K. and U.S parties ended up in a "remarkable sequence of events leading to perhaps the first world-wide plan of orderly liquidation ever achieved."[33]

The protocol adopted in the Maxwell case has been regarded as a model in subsequent cases, including: (i) *Olympia & York* (U.S. and Canada), in which the parties agreed on the composition and the indemnification of the board of directors of the debtor company and its subsidiaries, without addressing the issues related to the reorganization plan and the asset distribution;[34] (ii) *Nakash*[35] (Israel and U.S.), which involved an Israeli receiver of an insolvent bank suing, in Israel, a former director at the time subject to bankruptcy proceedings in the U.S. and whose protocol provided a method of resolution for potential conflicts of jurisdiction and partially lifted the automatic stay on the U.S. debtor to the benefit of the Israeli receiver;[36] and (iii) *Commodore*[37] (U.S. and Bahamas), the protocol of which addressed the issues of asset management and distribution and, as has been noted, "mark[ed] the beginning of a new era in which protocols evolved from one-time-use measures of crisis aversion into more generally applicable planning documents."[38] In all these cases, the stipulation of a protocol has allowed the avoidance of long and wearing litigation on jurisdictional and enforcement issues, thereby permitting the rescueof the company through the adoption of parallel reorganization plans, agreed upon by the representatives and filed simultaneously before the respective bankruptcy courts.

b. The IBA Concordat and its implementation.

In 1995 International Bar Association undertook an effort to provide a normative framework for the management of cross-border bankruptcy cases. The result was the Cross-Border Insolvency

[33] *In re* Maxwell Commc'n Corp., 93 F.3d 1036, 1042 (2d. Cir. 1996).

[34] For a discussion, see BOB WESSELS, BRUCE A. MARKELL & JASON J. KILBORN, *supra* note 3, at 181; Steven Sharpe, *Dynamics of Cross-border Work-Out* in E. BRUCE LEONARD & CRISTOPHER W. BESANT (EDS.), CURRENT ISSUES IN CROSS-BORDER INSOLVENCY AND REORGANIZATIONS 59 (Springer, 1st ed. 1994); and also Edward T. Canuel, *United States-Canadian Insolvencies: Reviewing Conflicting Legal Mechanisms, Challenges and Opportunities for Cross-Border Cooperation*, 4 J. INT'L BUS. & L. 8 (2005).

[35] *Order Approving Cross-border Protocol, Granting Comity to Jerusalem District Court letter fo Request, Setting Damages for Intial Stay Violation and Granting Nuc Pro Tunc Stay Relief in Respect of Alleged Further Stay Violations,* In Re Nakash, Ch. 11 Case No. 94-B-44840 (BRL) (Bankr. S.D.N.Y. May 23, 1996).

[36] For a discussion of this case *see* Evan D. Flaschen & Romand J. Silberman, *Cross-Border Insolvency Cooperation Protocols*, *supra* note 31, at 593.

[37] *In re* Commodore Int'l Ltd., Case No. 94-B-42185 (Bankr. S.D.N.Y. 1997).

[38] BOB WESSELS, BRUCE A. MARKELL & JASON J. KILBORN, *supra* note 3, at 182.

Concordat,[39] document, which contains some guidelines addressed to courts involved in cross-border insolvency proceedings. As a general approach, the Concordat advocates cooperation and coordination of the proceedings. In particular, it identifies as essential the recognition of the foreign representatives' right to be heard in and to receive notice of foreign hearings; moreover, the Concordat extends similar rights to creditors. The Concordat includes a specific reference to protocols in Principle 4(a), which provides in relevant part that "each forum should co-ordinate with each other, subject in appropriate cases to a governance protocol."[40] The official comment to this provision explicitly indicates the Maxwell protocol as a model for bankruptcy court cooperation and encourages bankruptcy judges and practitioners to follow this example.

The Concordat was immediately referred to as a model in the protocol adopted in December 1995 by the Bankruptcy Court of the Southern District of New York and the Ontario Court of Justice in the parallel reorganization proceedings in *Everfresh Beverage Inc.*[41] The *Everfresh* protocol represented an important step forward from the previously adopted protocols in that, in addition to the usual provisions imposing duties to cooperate in good faith, to exchange information, and to endeavor to submit parallel plans of reorganization, *Everfresh* also included some specific provisions: (i) regulating the scope of jurisdiction of the two courts involved in the case; (ii) authorizing all creditors to file their claims in either of the two proceedings; and (iii) establishing that all avoidance actions in the U.S. shall be governed by applicable U.S. law and that the similar actions may be initiated before Canadian courts by the Canadian receiver solely with the express consent of the U.S. debtor in possession. However, the plan did not contain any provision aimed at modifying the rules on distribution to creditors, which was then to be carried out in accordance with the law of the court approving the transaction. It has been noted, thus, that the protocol adopted in this case combined elements of territorialism (in that assets were to be disposed pursuant to the rules applicable in the jurisdiction in which they were located) and of universalism (since it mandated the filing of "substantially similar" reorganization plans).[42] In addition, on a side-matter it is also interesting to note

[39] Available at www.iiiglobal.org. For a discussion, *see* Anne Nielsen, Mike Sigal & Karen Wagner, *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L. J. 533 (1996); John K. Londot, *Handling Priority Rules Conflicts in Itnernational Bankruptcy: Assessing the International Bar Association's Concordat,* 13 BANKR. DEV. J. 163 (1996).

[40] *See* IBA Cross-Border Insolvency Concordat. Principle4(a).

[41] *See* Order Approving Cross-Border Insolvency Protocol, In re Everfresh beverages Inc., (Bankr. S.D.N.Y. 1995). *See also* E. Bruce Leonard, *The Everfresh Reorganization: Advancing Co-operation in Cross-Border Insolvencies* in JACOB S. ZIEGEL & DAVID BAIRDS (EDS), CASE STUDIES IN RECENT CANADIAN INSOLVENCY REORGANIZATION 325 (Carswell, 1st ed. 1997).

[42] *See* BOB WESSELS, BRUCE A. MARKELL & JASON J. KILBORN, *supra* note 3, at 185.

that in Everfresh for the first time joint American-Canadian hearings were held by conference telephone.[43] In 1998, a similar approach was adopted by the protocol in the U.S.-Swiss proceedings *AIOC Resources AG*,[44] which also expressly referred to the IBA Concordat guidelines. Like the *Everfresh* protocol, the *AIOC* protocol also included a provision establishing joint jurisdiction of the U.S. Bankruptcy Court and the Swiss Bankruptcy Office over the transactions regarding the assets (both in the U.S. and in Switzerland) of one debtor company.[45]

Hence, the approval of the IBA Concordat and of the subsequent protocols mark an important step forward in the use of bankruptcy protocols, which are not perceived anymore as an exceptional tool for addressing cross-border litigation issues.

c. The standardization of bankruptcy protocols.

As protocols became a ordinary tool in bankruptcy proceedings, their contents became more and more standardized. This trend towards standardization is especially clear in the protocol jointly adopted by the New York and the Ontario bankruptcy courts in the 1998 *Livent* case, which paraphrased entire sections of the earlier *Everfresh* protocol. These sections related to the jurisdictional scopes of the courts involved, the filing of creditors' proofs of claims, the parallel submission of reorganization plans, and the law governing avoidance actions. In addition, the *Livent* protocol addressed in great detail the conducting of the hearings, by including provisions expressly authorizing joint hearings via telephone or video conference,[46] mutual assistance in evidentiary matters, and direct communication between the courts involved.

However, the real genesis of a movement of standardized protocols occurred in the 1999 *Loewen* case,[47] when the most significant provisions in the *Livent* protocol were incorporated in the protocol adopted by the Delaware Bankruptcy Court and the Ontario Superior Court of Justice. The *Loewen* protocol has been regarded as a model and repeated word-for-word in virtually every protocol jointly entered into by U.S. and Canadian courts in the ten years subsequent to its adoption.[48] In fact,

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[43] This circumstance is recalled by E. Bruce Leonard, *The Everfresh Reorganization: Advancing Co-operation in Cross-Border Insolvencies, supra* note 41, at 325.

[44] Cross-Border Liquidation Protocol For AIOC Resources, AG, et al., *In re* Aioc Resources AG, Cases Nos. 96-B 41895 and 96-B-41896 (Bankr. S.D.N.Y. 1996).

[45] *See also* discussion at para. 1.e *infra.*

[46] On the actual conduction of these joint hearings via video conference, *see* Sean Dargan, *The Emergence of Mechanisms for Cross-Border Insolvencies in Canadian Law*, 17 CONN. J. INT'L L., 122 (2001).

[47] *See* Cross-Border Insolvency Protocol for Loewen Group Inc. and its Affiliates, *In re* Loewen Group Inc., Case No. 99-1244 (Bankr. D. Del. June 30, 1999).

[48] The *Loewen* protocol has served as the identifiable model for protocols adopted in the following cases: *In re* Philip Services Corp., Philp Services (Delaware), Inc., Case no. 99-B-02385 (Bankr. D. Del. 1999) (Delaware – Ontario); *In re*

the degree of standardization of protocols based on the *Loewen* precedent is such that debtors who file bankruptcy petitions with the New York and Delaware courts have tended to seek approval of these protocols in first-day orders. Unlike the cases discussed *supra*, the *Loewen* protocol does not include any provision specifically dealing with the delimitation of the courts' jurisdiction, the filing of proofs of claim, or the law governing the avoidance actions. On the contrary, the protocol adopts a very neutral position with respect to those issues possibly involving conflicts of jurisdiction or of governing law and clearly states that it is not intended to "divest or diminish the U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter" of the cases pending before them.[49] The same deference to each court's autonomy is further confirmed by the express recognition in the *Loewen* protocol that "the U.S. Court and the Canadian Court are independent courts"[50] and that "each of the Courts shall be entitled at all times to exercise its independent jurisdiction and authority with respect to (a) matters presented to such courts and (b) the conduct of the parties appearing in such matter."[51] Similarly, the protocol provided also that that it was not intended to "increase, decrease or otherwise modify the independence, sovereignty or jurisdiction" of the two courts or require any party involved in the bankruptcy proceedings "to take any action […] that would result in a breach of any duty imposed on them by any applicable law" or "preclude any creditor […] from asserting [its] rights under the applicable law."[52] Accordingly, it has been correctly noted that "perhaps the Loewen protocol was so successful as a model for later cases because it says so little,"[53] especially with respect to those issues (such as jurisdiction, applicable law or creditors' claims) that are more likely to cause conflicts between the courts involved in parallel bankruptcy proceedings.

Matlack Systems, Inc., Case No. 01-01114 (Bankr. D. Del. 2001) (Delaware – Ontario); *In re* PSINet Inc., Case No. 01-13213 (Bankr. S.D.N.Y. 2001) (New York – Ontario); *In re* Laidlaw USA, Inc. et al., Case Nos 01-14099K through 01-14104K (Bankr. W.D.N.Y. 2001) (New York – Ontario); *In re* 360Networks Inc., Case No. 01- 13721, (Bankr. S.D.N.Y. 2001) (New York – British Columbia); *In re* Pioneer Companies, Case No. 01-38259 (Bankr. S.D. Tex. 2001) (Texas – Quebec); *In re* Financial Assets Management Foundation, Case No. 01-03640-304 (Bankr. S.D. Cal.) (California - British Columbia); *In re* Mosaic Group, Case No. 02-81440 (Bankr. N.D.Tex. 2002) (Texas – Ontario); *In re* Calpine, Case No. 05-60200 (Bankr. S.D.N.Y. 2005) (New York – Alberta); *In re* Pope Talbot Inc., Case No. Case No. 07-11740 (Bankr. D.Del. 2008) (Delaware – Ontario); *In re* Quebecor World Inc., Case No. 08-10152 (Bankr. S.D.N.Y. 2008) (New York – 2008); *In re* Progressive Moulded Products Limited, (Bankr. D.Del. 2008) (Delaware – Ontario); *In re* Nortel Networks Inc., Case No. 09-10138 (Bankr. D.Del. 2009) (Delaware – Ontario); *In re* Smurfit-Stone Container Corp., Case No. 09-10235 (Bankr. D.Del. 2009) (Delaware – Ontario); *In re* Masonite International Inc., Case No. 09-10844 (Bankr. D.Del. 2009) (Delaware – Ontario); *In re* Eddie Bauer Holding, case No. 09-12099 (Bankr. D.Del. 2009) (Delaware – Ontario); *In re* Barzel Industries Inc., Case No. 09-13204 (Bankr. D.Del. 2009) (Delaware – Ontario); *In re* Nortel Networks Corp, Case No. 09-10138 (Bankr. D.Del. 2009) (Delaware – Ontario); *In re* Abitibibowater Inc., Case No. 09-11296 (Bankr. D.Del. 2009) (Delaware – Quebec).

49 *See Loewen* protocol, *supra* note 47, at para. 6.

50 *See id,* at para. 12.

51 *Id.*, at para. 12.

52 *See id.,* at para. 8.

53 BOB WESSELS, BRUCE A. MARKELL & JASON J. KILBORN, *supra* note 3, at 188.

Besides restating the *Livent* protocol provisions on court-to-court communication and joint hearings, the other most relevant features of the *Loewen* protocol focused on the mutual recognition of the proceedings, on the commitment of each court to enforce the automatic stay prescribed by the foreign bankruptcy law (on the scope of which each court can consult with the other in case of doubt),[54] and the procedure for resolution of disputes relating to the application of the protocol (under which any court would first consult with the other court and then, subject to its own discretion, either adjudicate on this issue on its own, transfer the matter to the other court, or seek a joint hearing).[55] In addition, the protocol implemented the IBA Concordat guideline providing for the right of each interested party to appear and be heard in either court.[56]

Following the *Loewen* case, the process of standardization of protocols in U.S.-Canadian cross-border bankruptcies was significantly improved by the adoption of another soft-law instrument framed by the American Law Institute in 2000. These Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases contain certain guidelines that primarily address joint hearings, parties' participation to hearings held in foreign proceedings, and issues of communication, such as notices to creditors or other interested parties. The ALI Guidelines have become very influential and are being routinely adopted by U.S. courts, which often expressly incorporate them by reference in the protocols or attach them to the protocols as an annex.[57]

d. The latest evolution of protocols in the U.S.

After the financial crisis of 2007–09 and the consequent increase of the number of insolvencies, a new wave of protocols in cross-border proceedings has emerged for bankruptcy cases involving multinational financial debtor companies. This represents a departure from the standard *Loewen* protocol, which, as refined in subsequent cases, is still being used for cases involving traditional manufacturing or service businesses. Indeed, bankruptcy cases regarding multinational financial businesses contain some distinctive features. They generally require bankruptcy trustees to consolidate a substantial number of financial arrangements. In addition, they make sense of the flows of information among corporate entities belonging to the same group, also in order to determine the

[54] It should be remarked, though, that also in this instance the protocol contains a clause, which specifically preserves any right under the applicable domestic law "to assert the applicability or non-applicability" of the stay. *See Loewen* protocol, *supra* note 47, at para. 24.

[55] *See id.,* para. 21.

[56] *See id.,* para. 20.

[57] *See*, *e.g.*, the protocols adopted in the *Matlack*, *PSINet*, *Calpine*, *Progressive Moulded Products*, *Smurfit-Stone*, *Masonite*, *Eddie Bauer Holdings*, *Barzel* and *Abitibibowater* cases captioned *supra* note 48.

identity of the creditors and the possibility of commencing preference avoidance actions. When a financial business is group composed by separate corporate entities subject to bankruptcy proceedings in different states, consolidation might be more difficult and, eventually, jeopardize the successful outcome of the case. Accordingly, as the group structure may vary and the intra-group relationships do not follow predetermined pattern, cross-border bankruptcy cooperation mechanisms must be tailored to the business structure of the debtor financial company. The most notable examples of this new approach to bankruptcy protocols for multinational financial companies can be found in the protocols of the almost contemporaneous cases of *Lehman Brothers* and *Madoff Securities*.

The *Lehman* protocol was initially approved by bankruptcy representatives from the U.S., Hong Kong, Singapore, and Australia in 2009 and was subsequently signed also by German and Dutch representatives of the local companies belonging to the Lehman Brothers Group. As counsel for the debtor noted:

> "[The p]rotocol is not a legally binding document; it is a statement of intentions and guidelines. It imposes no duties or obligations on anyone, and is not intended to be enforceable against any of the parties. […] In the absence of an international insolvency treaty to which the United States is a party, the [signatories of the protocol] have sought to forge a privately negotiated treaty."[58]

The *Lehman* protocol does not include any provision dealing with jurisdictional or choice-of-law issues. On the contrary, it mainly focuses on the treatment of creditors' claims, by providing guidelines for the filing of proofs of claims against multiple debtors, in their capacity as either co-debtors or guarantors. Moreover, a significant portion of the *Lehman* protocol is devoted to the establishment of a special procedure for the reconciliation of intercompany claims. Given the complexity of these claims, and the difficulties that courts would face in reconstructing the complex web of the financial relationships between the entities belonging to the Lehman group, the protocol provided for the appointment of a committee in charge of developing a common set of financial accounting records to form the basis of the reconciliation of such intercompany claims. Besides these innovative provisions, the *Lehman* protocol also included more traditional arrangements on court-to-court communications (to be performed pursuant to the ALI Guidelines) and on the right of the interested parties to appear before foreign courts.

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[58] *See* Notice of Debtors' Motion Pursuant To Sections 105 And 363 Of The Bankruptcy Coded For Approval Of A Cross-Border Insolvency Treaty, *In re* Lehman Brothers Holdings Inc. et al., Case No. 08-13555 (Bankr. S.D.N.Y., May 26, 2009).

The *Madoff* protocol[59] was entered into by the U.S. trustee of Bernard L. Madoff Securities LLC, the broker-dealer company run by Bernard L. Madoff and subject to liquidation pursuant to §78eee(a)(4)(A) of the Securities Investor Protection Act before the U.S. Bankruptcy Court for the Southern District of New York, and by the British liquidators of Madoff Securities International Limited, the U.K. corporate vehicle employed by Mr. Madoff and his family for personal business trade, subject to liquidation before the High Court of Justice of London. At the time of the commencement of the U.S. and U.K. proceedings and of the stipulation of the protocol, the representatives of the two companies were barely aware that the two debtors were engaged in a complex Ponzi scheme, in which assets were fraudulently siphoned from the U.S. broker-dealer to be transferred to the U.K. Madoff's personal vehicle and then reinvested. Thus, the representatives needed to investigate the flow of payments from one company to the other and to identify the assets of the U.K. company in order to proceed to an orderly liquidation. In this sense, the *Madoff* protocol is a peculiar one, in that it was entered into by a debtor (the U.K. company) and its main creditor (the U.S. broker-dealer), both subject to insolvency proceedings. Moreover, an additional unique element was provided by the ongoing criminal and administrative investigations in the two companies.

Given the specificities of the relationships between the entities involved in the parallel proceedings, the *Madoff* protocol mainly focuses on issues relating to the sharing of information (which are dealt with in a separate document), while the provisions on the traditional subject matter of bankruptcy protocols (such as assets identification, comity, right of representative to appear before foreign courts, etc.) are extremely generic.

e. Protocols in European civil-law countries.

The history of protocols in continental European countries is much less complex than that of the U.S.[60] [61] The first protocol approved by a civil law jurisdiction was in the above-mentioned 1998 *AIOC*

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59 Order Pursuant to Sections 1526, 1527 and 105(a) Of The Bankrutpcy Code Approving Protocols By And Between The Trustee and The Joint Provisional Liquidators Of The Madoff Securities International Limited, *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities Ltd.,* Adv. Pro. No. 08-1789 (Bankr. S.D.N.Y June 9, 2009).

60 For a thorough overview and a deeper analysis *see* MATIAS WITTINGHOFER, DER NATIONALE UNDE INTERNATIONAL INSOLVENVEZVERWALTUNGSVERTRAG: KOORDINATION PARALLELER INSOLVENZVERFAHREN DURCH AD HOC-VEREINBARUNGEN (Gieseking Verlad, 1st ed. 2004).

61 A limited number of protocols other than those discussed in the present paper are reported to have been entered into by continental European courts. *See* UNCITRAL, *Practice Guide on Cross-Border Insolvency Cooperation,* 115-40 *available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html* (last visited March 30, 2013) [hereinafter UNCITRAL, *Practice Guide*]. However, since these protocols are not publicly available, they will not be analyzed or discussed in great details in this paper.

case, involving a U.S.-Swiss debtor.[62] As discussed *supra*, the *AIOC* protocol between a U.S. trustee and a Swiss administrator provided that the latter take all necessary actions to have the claims filed in the U.S. case recognized in its Swiss counterpart, without the need for additional filing. Moreover, it also provided that any settlement reached between the U.S. trustee and certain lending banks would be subject to the prior approval of the Swiss administrator, presumably in order to avoid that the banks' claims were filed for different amounts in the two proceedings. Interestingly, the protocol also attempted to define the scopes of the jurisdiction of the U.S. and the Swiss cases, by providing that: (i) the administration and the disposition of the assets belonging to the holding company would be subject to the joint jurisdiction of the two courts; (ii) the Swiss court would have exclusive jurisdiction over the subsidiaries incorporated in Switzerland, irrespective of the location of their assets; and (ii) the U.S. court would have jurisdiction over all other companies belonging to the group. However, the actual effects of the provision defining the jurisdiction of the two courts was not further clarified by the protocol, since the protocol merely imposed a duty upon each representative to seek in good faith the approval of the other party before taking any significant action with respect to the management and the disposition of the assets falling under his jurisdiction. Since the protocol does not specify the consequences in case of failure to obtain such approval, the importance of the provision establishing a U.S.-Swiss joint jurisdiction over the case is greatly diminished.

This *AIOC* protocol represents arguably the only protocol approved in a case involving a U.S. and a continental European court. However, a few other instances of protocols exist in the context of intra-European cross-border bankruptcy cases governed by the E.U. Regulation. Arguably the most notable of these is the protocol approved in 2006 by the British administrators and the French liquidators in *Sendo International*,[63] which was pending simultaneously before both the High Court of London, as the main insolvency proceeding under the E.U. Regulation, and the Commercial Court of Nanterre, as the secondary proceeding.[64]

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[62] *See supra* note 43. It is uncertain whether the *Nakash* protocol adopted by the Jerusalmen Court (Israel) in 1995 can be regarded as approved by a civil-law country, since Israeli bankruptcy law is generally perceived as a common-law one, in which the bankruptcy court has wide discretionary and equitable powers. *See* Irit Haviv-Segal,*Insolvency law,* in Amos Shapira (ed.), *Introduction to the Law of Israel,* KLUWER LAW INTERNATIONAL, 327, 346 (1995). However, some commentators point to the N*akash* protocol as one entered into between a common-law and a civil-law court. *See* Evan D. Flaschen & Romand J. Silberman, *Cross-Border Insolvency Cooperation Protocols*, *supra* note 30, at 593; David M. Klaristenfeld, *Old Wine In Recycled Bottles: An Overview Of Israeli Commercial and Insolvency Law,* 13 AM. BANKR. L.J. 12 (1994). *See also* UNCITRAL, *Practice Guide*, *supra* note 61.

[63] Protocol Agreement For The Coordination Of A Main Insolvency Proceeding With A Secondary Insolvency Proceeding Filed In Conformity With European Regulation N° 1346-2000 Of 29 May 2000, *available on www.iiiglobal.org* (last visited: March 30, 2013).

[64] For a brief discussion of this case, *see* BOB WESSELS, BRUCE A. MARKELL & JASON J. KILBORN, *supra* note 3, at 189 and BOB WESSELS, JUDICIAL COOPERATION IN CROSS-BORDER INSOLVENCY CASES 23 (Kluwer, 1st ed. 2008).

From its outset, the *Sendo* protocol bears almost no resemblance to the protocols discussed above. First, it was entered into by the representatives of the two proceedings in the form of a private agreement and was not approved by an order of either of the two courts involved.[65] Second, rather than establishing an innovative normative framework, it merely interpreted and supplemented the E.U. Regulation's provisions on court-to-court cooperation. This was made clear in the recitals of the protocol, in which the parties stated that they "ha[d] come to understand that the (EC) regulation establishes only very general operating principles," and that, consequently, they "wish[ed] to enter into an informal agreement for the purpose of defining a practical means of functioning which would allow for the efficient coordination of the two insolvency proceedings and would respect the general operating principles established by the (EC) regulation."[66]

For instance, in the *Sendo* protocol the two representatives agreed to interpret Article 40 of the E.U. Regulation, which mandates a bankruptcy representative to notify the commencement of an insolvency proceedings to all known creditors, irrespective of their residence, as imposing the following obligation: the French liquidator would have to notify only the British representative, who, in turn, would inform the English creditors. Another provision of the *Sendo* protocol dealt with Article 32 of the E.U. Regulation, which stipulates that the representative of one proceeding can lodge the claims filed in his case in a foreign proceeding involving the same debtor. Correspondingly, in the protocol, the British representative acknowledged no interest in lodging the British claims in the French proceedings, given the minimal value of the assets in the French bankruptcy estate, and the French representative agreed to submit to his English counterparty a list of local creditors, in order to avoid potential double payments. Yet another example of the supplementary and interpretative approach adopted in the *Sendo* protocol is found in its incorporation of Article 33. Here, the Regulation provides that the representative of the main proceeding may request of the court of the secondary proceeding a three-month stay of the liquidation process; in the protocol, the representative of the English main proceeding undertook not to apply for such stay before the French court, in order not to interfere with the French representative's activities in the secondary proceedings. In sum, the *Sendo* protocol merely realized a bargain within the room for maneuver allowed by the E.U. Regulation, rather than creating an innovative normative framework.

A similar approach was adopted by a general protocol entered into by the Italian Bar

[65] The protocol only recites that it was signed "before the Bankruptcy Judge with the Commercial Court of Nanterre," without specifying that the latter had approved or ratified it.

[66] Protocol Agreement For The Coordination Of A Main Insolvency Proceeding With A Secondary Insolvency Proceeding Filed In Conformity With European Regulation N° 1346-2000, *supra* note 63.

Association (*Consiglio Nazionale Forense*), the Italian Association of Public Accountants (*Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili*), and the French Association of Bankruptcy Receivers and Administrators (*Conseil National des Administraeurs Judiciaris et des Mandataires Judiciaries*) in May 2010 (the "French-Italian Protocol").[67] This protocol does not deal with a specific bankruptcy case, but rather provides some general guidelines, the application of which, as clarified by the recital of the protocol, "shall be subordinated to the E.U. and domestic applicable rules, which shall prevail over the Protocol's dispositions."[68] Thus, similar to the ALI and IBA guidelines discussed above, the French-Italian Protocol is a non-binding instrument which only suggests certain best practices in the cross-border insolvency proceedings pending in the two countries. Not unlike the *Sendo* protocol, the French-Italian Protocol interprets and supplements certain provisions of the E.U. Regulation, dealing, in particular, with the notice to foreign creditors and the lodging of claims in foreign proceedings (Article 32), the verification of the proofs of claims (Articles 4 and 28), the stay of the secondary proceeding (Article 33), and the distribution of the proceeds (Article 20).

No other bankruptcy protocol between, or involving, continental European countries is currently published. However, the history of the European protocols that have not been approved is at least as interesting as that of the protocols that have been approved. The most notable example of a non-approved protocol occurred in *Lernout & Hasupie Speech Product*, in which the debtor, a company incorporated in Belgium and headquartered in Delaware with most of its assets in the U.S., filed for parallel bankruptcy proceedings in Belgium and in Delaware. A major issue arose with respect to a claim filed by a creditor, which had to be considered as a subordinated claim in the U.S. case pursuant to § 510(b) of the Bankruptcy Code and as a general unsecured claim in the Belgium case. The debtor sought and obtained an injunction from the U.S. bankruptcy court enjoining the creditor from prosecuting its claim in the Belgian case,[69] but the Third Circuit reversed this order as an inadmissible interference in the Belgian jurisdiction and remanded the case to the bankruptcy court for considerations of comity.[70] In its judgment, the Court of Appeals expressly referred to the protocol adopted in the *Maxwell* case and "strongly recommend[ed] […] that an actual dialog occur or be attempted between the courts of the different jurisdictions in an effort to reach an agreement as to how

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[67] Available at the website: http://www.consiglionazionaleforense.it/on-line/Home/BancaDation-line/Inevidenza/articolo6419.html (last visited March 30, 2013).

[68] English translation provided by the author.

[69] Lernout & Hauspie Speech Products, N.V. v. Stonington Partners, Inc., 268 B.R. 395 (D. Del. 2001).

[70] Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V., 310 F.3d 118 (3d. Cir. 2002).

to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign law."[71] In particular, the Court urged "that, in a situation such as this, communication from one court to the other regarding cooperation or drafting of a protocol could be advantageous to the orderly administration of justice."[72]

However, the Third Circuit's invitation to enter into a *Maxwell*-like protocol to resolve the issue concerning the controversial claim was not accepted by the Belgian court. As ascertained by the Delaware Bankruptcy Court on remand, "the actual dialog between [that] court and the Belgian court recommended by the Court of Appeals did not take place," because the Belgian representatives had advised that the proposed draft protocol "could not be adopted by a Belgian court because to do so would be violative of Belgian public order,"[73] since Belgian law does not permit creditors' subordination. As a consequence of the failure to have a protocol adopted, the Delaware Bankruptcy Court approved a reorganization plan under which a unilaterally determined portion of the assets recovered would be turned over to the Belgian estate for the benefit of Belgian creditors, including Stonington. The decision approving this plan was later affirmed by the district court, which stated that "the Third Circuit acknowledged that, while it strongly recommended coordination with the Belgian Court, such coordination was not mandatory." Hence, in this case, the failure of the Belgian court and representatives to agree on the priority ranking of a claim led to the outcome in which the Belgian creditors received only the portion of the proceeds unilaterally determined in the U.S.

Another instance of failed recourse to bankruptcy protocols in the context of the E.U. Regulation, *Collins & Aikman*,[74] involved a main proceeding commenced before the London High Court. In this case, the local creditors of the debtor's German and Spanish branches were informally convinced by the U.K. representative to refrain from opening secondary proceedings in their domestic jurisdictions (to which they were entitled to pursuant to Article 27 of the E.U. Regulation), and, instead, to file their claims in the U.K. main proceeding (which could thus operate as a universal one); this commitment was obtained by the U.K. representative's assurances that these non-U.K. claims would be governed by the respective domestic law within the main proceeding. However, this agreement between the U.K. representative, on the one hand, and the German and Spanish local creditors, on the

71 *Ibid*.

72 *Ibid.*

73 *In the matter of* Lernout & Hauspie Speech Products, N.V.*,* 301 B.R. 651 (Bankr. D. Del. 2003), *aff'd In re* Lernout & Hauspie Speech Products, N.V., 308 B.R. 672 (U.S. Del. 2004).

74 *In the matter of* Collins & Aikman Europe, SA, the High Court of England and Wales, Chancery Division, [2006] EWCH 1343 (Ch).

other, was not formalized in a protocol, but instead remained oral and informal.[75] [76]

2. The content of bankruptcy protocols: their structure and main provisions.

After having succinctly summarized above the main developments in the modern history of bankruptcy protocols in common-law countries and in continental Europe, the present section provides a brief discussion of contents of the protocols examined above. Firstly, the structure of the protocols will be analyzed, including the circumstances leading to their approval, their parties, and the role of the courts and the bankruptcy representatives. Secondly, this section will provide a discussion of the main provisions set forth in bankruptcy protocols, regrouping them in provisions dealing with procedural matters and substantive matters. This discussion should provide some clarification on the actual functioning of bankruptcy protocols and allow to draw some conclusions on why their use differs so greatly in common law jurisdictions as opposed to civil law ones.

a. The structure of bankruptcy protocols.

No uniformity of practices may be identified with respect to the circumstances leading to the negotiation and the adoption of a protocol, and the timing in which a protocol is approved. Indeed, while certain protocols have been entered into while parallel and potentially conflicting insolvency proceedings had already been commenced in two or more jurisdiction,[77] the most recent practice has shown that the parties tend to negotiate a protocol before filing the bankruptcy petition in their domestic courts in order to prevent conflicts from arising: in this way, draft protocol can be submitted to local courts for approval as first-day orders.[78] The timing plays an important role in the determination of the protocol's contents. Thus, if the protocol is approved while concurrent insolvency proceedings are already pending, it will primarily focus on the resolution of issues that have already arisen; on the other hand, if the protocol is entered into before the bankruptcy filing, it will tend to provide a roadmap for the addressing of issues that the parties assume will arise, but have not yet

[75] For a brief discussion see BOB WESSELS, BRUCE A. MARKELL & JASON J. KILBORN, *supra* note 3, at 189, and Gabriel Moss, *Group Insolvency—Choice of Forum and Law: The European Experice Under the Influence of English Pragmatism*, 32 BROOK. J. INT'L L. 1005, 1017-18 (2007).

[76] A similar mechanism for coordination through informal, oral agreements between representatives of foreign proceedings was reported to have occurred in the case of *United Pan-Europe* pending simultaneously before the Amsterdam Court (The Netherlands) and the Bankruptcy Court for the Southern District of New York (Case No. 02-16020). For a discussion *see* UNCITRAL, *Practice Guide*, *supra* note 61, at paras. 139-40.

[77] See, e.g., the protocols adopted in the following cases discussed above in Part One, para. 1.a: *Maxwell*, *Lehman*, and *Madoff*.

[78] The protocol following the *Loewen* model were generally drafted prior to the commencement of the case by the U.S. debtors, who were confident that Canadian representatives and courts were going to approve them. *See supra* note 48.

materialized.

A for the form of the protocols, the negotiation process generally leads to the production of a written document in the form of a contractual commercial agreement having a section for the identification of the parties, recitals, provisions articulated in paragraphs and subparagraphs, and signatures placeholders. However, as discussed, oral protocols have also been reported.[79]

The practice also shows that different parties can concur in the adoption of a protocol. In most instances, it is negotiated and entered into by court-appointed representatives of the debtor (either a debtor-in-possession, where allowed under domestic bankruptcy law, or third-parties administrators, trustees, or the like). In most cases involving a U.S. bankruptcy case, the protocol negotiated by the debtor's representative was subsequently approved by a court order. Though a sort of agreement between courts can be deemed to exist when courts approve an identical protocol through separate orders, bankruptcy judges cannot formally be regarded as parties to the agreement. However , in most instances they supervise its negotiation process, which nevertheless is mostly driven by bankruptcy representatives.[80] In some rare instances, protocols have also been approved by a committee of creditors.[81] In the earliest protocols,[82] the U.S. bankruptcy representatives were generally assisted by a court-appointed neutral examiner, in charge of engaging with the parties, recommending course of actions, and reporting to the court.[83]

The identities of the parties entering into the protocol depend very much on their powers under the applicable domestic bankruptcy law. Indeed, while in some jurisdictions—mostly common law—the bankruptcy representatives have broad discretionary power to administer the bankruptcy estate for the benefit of the creditors, in other legal systems representatives can only perform the actions permitted by the applicable bankruptcy law, often only upon approval of creditors or of the court.[84] The same is also true for bankruptcy courts: while common-law jurisdictions allow these courts "general equitable or inherent powers"[85] for the management of the case, civil law legislation usually requires courts to rely on an adequate and strictly drafted statutory basis for the exercise of their powers. As it will be discussed in greater detail below, this circumstance has led some commentators to express

[79] *See supra,* at 22.
[80] *See* UNCITRAL, *Practice Guide*, *supra* note 61, at paras. 32-33.
[81] This was the case, e.g., of the protocols in the *Financial Asset Management Funation* and in the *Commodore* case. *See supra* note 48. The protocol in the Madoff case, as discussed above, was agreed by the bankruptcy representatives of a debtor and a creditor, both subject to insolvency proceedings in their home jurisdictions. *See supra* note 59.
[82] See, e.g., the protocols in the *Maxwell*, *Nakash*, *Olympia & York*, and *Commodore* cases, *supra* note 48.
[83] For a discussion, see Flaschen & Silberman, *supra* note 31.
[84] *See* UNCITRAL, *Practice Guide*, *supra* note 61, at para. 34.
[85] *See* §105 of the U.S. Bankruptcy Code.

skepticism about the "feasibility of such agreements being approved by some courts because of the lack […] of available judicial discretion."[86] Indeed, it has been observed that "insolvency agreements occur in practice more frequently in common law jurisdictions, where courts have wider discretion than in jurisdiction in which statutory authorization to enter into such arrangements […] is needed."[87]

Further, the relationships between the parties to, and the courts approving, a protocol can greatly vary, depending on the specific procedural posture of the case. In most instances, protocols are agreed upon by bankruptcy representatives of a same debtor, which is subject to concurrent bankruptcy proceedings before courts from different jurisdictions. However, the identity of the parties may often reflect the business articulation of the debtor. For example, when the debtor is organized as a corporate group, proceedings in one state may involve the holding company and the subsidiaries incorporated in that state, while the concurrent proceeding in the other jurisdiction may involve the same holding group, but other subsidiaries. Moreover, an additional element of complexity is posed by the fact that the liabilities of corporate groups may be substantively consolidated under some bankruptcy laws.

b. The main provisions included in bankruptcy protocols.

As was outlined in the historical overview above, the contents of protocols, despite great variances, tend to nonetheless share some common provisions, the understanding of which is important for the purposes of the present paper. For the sake of simplification, the main provisions of bankruptcy protocols can be divided according to their focus on either procedural or substantive matters.

i. Protocol provisions dealing with procedural matters.

Protocol provisions dealing with procedural matters occur most frequently. This is likely because courts and bankruptcy representatives have more discretionary powers with respect to procedural as opposed to substantive issues. As discussed above, all issues related to cross-border insolvency proceedings are ultimately concerned with the substantive problem of allocating bankruptcy resources among creditors irrespective of their localization. However, the ultimate outcome of a cross-border case generally depends on how procedural issues, such as jurisdiction or court-to-court cooperation, are addressed.

In particular, the definition of the jurisdictional scope of the insolvency proceedings relating to the multinational debtor is an extremely delicate matter to be addressed in a protocol. On the one hand,

[86] UNCITRAL, *Practice Guide*, *supra* note 61, at para. 34.
[87] *Ibid.*, at para. 35.

courts' jurisdiction is generally determined by domestic law and cannot be subject to a bargaining process. On the other, long and wearing disputes over jurisdiction can, as a matter of practice, threat the efficient outcome of the cross-border insolvency proceedings. Thus, understandably protocols tend to address the issue of bankruptcy jurisdiction in a rather oblique and cryptic fashion.

Most of the protocols discussed above contain an opening clause emphasizing the importance of comity and courts' independence, and further specify that such independence is not affected or diminished by the protocol. They also add that the protocol should not be construed as altering the independence, sovereignty or jurisdiction of the courts, nor should it preclude any creditor from seeking the remedies and asserting the rights available in his jurisdiction.[88] As has been noted, "the purpose of including such a provision is to provide an assurance that each party to the agreement is acting in accordance with (and therefore with the limits of) the applicable law."[89]

The contradiction between bankruptcy court's independence (which protocols claim to preserve) and constraints (which are actually imposed on courts entering into protocols) is addressed by including in the protocols provisions formally aimed at the mutual recognition of the jurisdictional powers of the courts involved in the proceedings, rather than limiting them. In other words, by agreeing on a protocol, parties merely recognize—rather than allocate—jurisdiction. However, there are some notable exceptions in which the courts agreed to exercise "joint jurisdiction" over certain assets or claims,[90] or set forth criteria to determine their respective jurisdiction (such as, for instance, the law applicable to the claim.)[91] Some scholars have also argued that protocols could be used by courts to agree on COMI issues in the context of the E.U. Regulation,[92] but this suggestion has never been implemented in real cases.

In other instances, the protocols tend to resolve jurisdictional issues by allocating specific responsibilities among the courts involved in the proceedings. For instance, responsibility for the approval of certain transactions may be allocated to the court of the State in which the assets that are the subject of the transaction are located.[93] Responsibility for dealing with claims against the debtor

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88 See, e.g., the protocols based on the *Loewen* model, *supra* note 48.

89 UNCITRAL, *Practice Guide*, *supra* note 61, at para. 51.

90 See, e.g., the protocol approved in the *AIOC* case, discussed *supra* notes 44, 62.

91 The protocol in the *Everfresh* case provided that the U.S. court "*s*hall have jurisdiction over all claims governed principally by the laws of the United States or any of its states", whereas "in the event that claims are governed principally by the laws of Canada, the objections to such claims may be brought in either the Canadian Proceedings or the [U.S.] Bankruptcy Court." *See* the *Everfresh* protocol *supra* note 41, at para. 8.

92 *See* Susan P. Johnston & John Han, *A Proposal for Party-Determined COMI in Cross-Border Insolvencies of Multinational Corporate Groups*, 16 NORTON J. BANKR. L. & PRAC. 811, (2007).

93 See, e.g., the protocol in the *Everfresh* case, *supra* note 41.

may be allocated to the court of the State of which the debtor is a national, or in which the claimants reside.[94] In addition, some agreements specify joint responsibility over certain transactions, such as the disposal of the debtor's assets.[95] Though employing the language of allocation of responsibilities for specific matters, these dispositions ultimately tantamount to jurisdictional determinations.

Often jurisdictional issues are addressed by the protocols in the somewhat different form of so-called deferral clauses, in which one court accepts a limitation on its responsibility with respect to certain matters in favor of another court. Such deferral provisions may be narrow, i.e. limited to specific matters such as the the appointment of new directors of the debtor company,[96] or have a more general scope.[97] Similar to a determination on jurisdictional issues, "deferral is a sensitive issue, touching on issues of sovereignty and independence."[98]

In addition, sometimes include clauses setting forth procedures to deal with certain issues that are common to the courts involved. For instance, the parties may agree to await another court's ruling before hearing submissions and "independently" adjudicating the same or a closely related matter.[99] This does not result in a formal relinquishing of sovereign jurisdiction by a court; instead, it represents a pragmatic delay of decision, which thereby reduces the potential of conflicting judgments. Similarly, bankruptcy representatives often agree in protocols to make efforts to jointly negotiate and submit parallel plans of reorganizations in their home jurisdictions, in order to avoid potential post-confirmation conflicts.[100]

Besides providing for a definition of the jurisdictional reach of each court involved, protocols usually establish special procedures for a wide range of procedural matters. For instance, as discussed above,[101] one of the major innovations adopted by the *Everfresh* protocol (subsequently confirmed by the *Loewen*-based protocols) was the provision for joint hearings to be held via phone or video conference, thus enabling the courts to deal with complex issues of different insolvency proceedings directly and in a timely manner. Protocols also often design procedures allowing direction communication by courts on case-related matters (which, as already mentioned,[102] is also the subject of the IBA Guidelines.) Direct court-to-court communication presents a delicate issue. For example, some

94 See, e.g., the protocol in the *Solv-Ex* case, *supra* note 48.
95 See, e.g., the protocol in the *Maxwell* case, *supra* note 31.
96 See, e.g., the protocol in the *Olympia & York* case, *supra* note 33, at para. 6(d).
97 See, e.g., the protocol in the *Interworld* case, *supra* note 48, at para. 6(d).
98 UNCITRAL, *Practice Guide*, *supra* note 61, at para. 56.
99 *Id.*, at para. 56.
100 See, e.g., the protocol in the *Everfresh* case, *supra* note 41.
101 *See supra* Part One, at para 1.c.
102 *See supra* p. 16 and note 57.

domestic law might mandate parties' attendance before the court in order to meet the requirements of due process.[103] Thus, special arrangements may be necessary in order to fully comply with domestic procedural requirements.

Special procedures can also be set forth with respect to giving notice to the court, the debtor's representatives, or his creditors in the parallel insolvency proceedings—to which they might not otherwise be entitled under the applicable domestic law—of certain matters deemed relevant for the success of the case. Protocols generally include a list of matters requiring notice and specify the parties bound to give, and those entitled to receive, such notice, as well as the method of communication.[104] Moreover, protocols can also agree on the confidentiality status of the information shared. However, in the current absence of case law on these matters, it is not clear whether such clauses are always enforceable and what would be the consequences arising from the breach of the special procedures set forth by protocols, both at procedural and at substantive levels.

Another procedural issue often dealt with in protocols is the right of foreign insolvency representatives to appear before and be heard by foreign court. The substantial importance of this matter is evidenced by its specific inclusion in the UNCITRAL Model Law (Article 9) and in the E.U. Regulation (Articles 18–19). However, in cases in which these two pieces of legislation were not applicable, protocols have often included analogous provisions in order to enhance cross-border cooperation. The approach most frequently adopted consists in explicitly establishing the right of foreign representatives to appear and be heard in a foreign court on a reciprocity basis.[105] Alternatively, the parties agree to support the counterpart's request to appear before the foreign court; under this alternative, the protocol merely contains an obligation to exercise the party's best efforts, rather than providing an assurance that the right to appear will be granted. Depending on the applicable domestic procedural law, these provisions are often coupled with protocol clauses stating that the motion to appear before a foreign court cannot be used to establish personal jurisdiction over the movant, or that it will only establish personal jurisdiction with respect to the matters for which appearance is granted.[106] The goal of these provisions is to overcome the reluctance of an insolvency representative to subject himself to the personal jurisdiction of a foreign State—of course, such safeguard clauses must be

[103] In the *Cenargo* case, during a joint English-U.S. hearing, the English judge mentioned that English law did not permit him to speak to another judge officially on any matter without the consent and the participation of the parties; thus, the various parties were allowed to participate to the conference call and to comment at the end of the conference (a transcript of which was circulated upon request of the English judge). For a report *see* UNCITRAL, *Practice Guide*, *supra* note 61, at para. 92.

[104] *See,* e.g., the protocols in the *Loewen, AIOC*, and *IWG Services* cases, *supra* notes 47, 44 and 48.

[105] *See,* e.g., the protocols following the *Loewen* model, *supra* note 48.

[106] *See,* e.g., the *AIOC* protocol, *supra* note 44.

approved by the court in order to be effective.[107]

Finally, one of the most relevant procedural issues addressed by bankruptcy protocols is the recognition and the enforcement of the automatic stay triggered by the commencement of a foreign insolvency proceeding. The automatic stay is a fundamental and inherent feature of arguably every domestic bankruptcy legislation, because it prevents the race of the creditors to acquire the debtor's assets. Thus, the enforcement of the stay abroad is an essential prerequisite for any attempt to establish an insolvency proceeding with universal effect. The scope and the effects of the automatic stay may greatly vary from one legal system to another, and enforcing a foreign stay can potentially negatively affect the interests of local creditors. Accordingly, some protocols only provide that a court may grant recognition and assistance to the foreign representative, including giving effect to the foreign stay.[108] Other protocols are more resolute in providing for joint and mutual recognition of the automatic stays; this proviso is often associated with a clause authorizing the court to consult with the other court on the interpretation and the scope of the stay under the foreign bankruptcy law.[109]

ii. Protocol provisions dealing with substantive matters.

As noted above,[110] protocols tend to avoid dealing directly with substantive issues; rather, they use procedural issues as proxies for them. For example, the parties may establish a procedure to negotiate and propose parallel plans of reorganization, rather than agreeing on how single claims should be treated. However, since the ultimate goal of any bankruptcy case is to redistribute wealth among the debtor and its creditors, substantive issues cannot always be avoided.

One of the substantive issues most often addressed by protocols is the use and disposition of the assets in the bankruptcy estate. Although this kind of issue can be regulated through jurisdictional clauses—e.g., through protocol provisions allocating responsibilities among courts and/or bankruptcy representatives to manage the debtor's assets—sometimes the parties agree in the protocol on the performance of certain substantive transactions regarding the bankruptcy estate. This may include, for instance, the voting of shares owned by the debtor or the appointment of members of the debtor company's board.[111] However, these provisions are not frequently included in protocols, because under domestic bankruptcy laws, creditors or other stakeholders might have the power to object to the

[107] *See* UNCITRAL, *Practice Guide*, *supra* note 61, at paras. 59-60.
[108] *See,* e.g., the *Federal-Mogul* protocol, *supra* note 48.
[109] *See,* e.g., the protocols following the *Loewen* model, *supra* note 48.
[110] *See supra* Part One, at para 2(b)(i).
[111] *See*, e.g., the *Olympia & York* protocol, *supra* note 34.

envisaged transactions. Thus, more often than not, protocols include a duty merely to attempt in good faith to cooperate and obtain the consent of the other party prior to the performance of certain substantive transactions.[112]

Sometimes protocols deal with substantive issues related to post-petition debtor financing of the debtor. This issue is subject to a wide spectrum of different legal national regimes and can, thus, potentially trigger significant conflicts between courts in parallel proceedings. For instance, parties can explicitly authorize one representative to borrow new funds or encumber assets.[113] However, more often the issue of post-petition debtor financing is dealt with at procedural level, through setting forth a duty to cooperate and seek the other party's consent to the obtaining of fresh financing[114] or by allocating the responsibility for this transaction within the exclusive jurisdiction of one insolvency proceeding in order to avoid conflicts.[115]

Another relevant substantive issue often dealt with relates to the identification of creditors' claims. National bankruptcy laws obviously have different rules on the treatment of debtor's liabilities, including, but not limited to, the granting of a priority status or a security interest. As mentioned above,[116] both the UNCITRAL Model Law and the E.U. Regulation include a number of provisions dealing with these issues.

Protocols have adopted different approaches in order to reconcile the various regimes on treatment of claims. Some of them operate exclusively at a procedural level. For instance, a protocol may provide that claims filed in one proceeding shall be deemed to be filed also in a parallel bankruptcy case, so that the creditor in the former case will participate in the distributions in the latter.[117] Or, courts and receivers may be required to make efforts to avoid double filings/payments.[118] Other protocols have gone further and established that one court will be bound by the decisions of the other court with respect to the claims governed by the law of the latter.[119] In some rare instances, parties themselves agree on the substantive treatment of certain claims: for example, in the United Pan-Europe case, the parties agreed on a particular treatment of certain subordinate claims in order to make it compliant with the law of both jurisdictions involved.[120]

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112 *See*, e.g., the *AIOC* protocol, *supra* note 44.
113 *See,* e.g., the *Commodore* protocol, *supra* note 38.
114 *See,* e.g., the *Maxwell* protocol, *supra* notes 31-32.
115 *See,* e.g., the *Mosaic* protocol, *supra* note 46.
116 *See supra* note 23.
117 *See,* e.g., the *Agri-Bio Tech* protocol, *supra* note 48.
118 *See*, e.g., the *SENDO* protocol, *supra* note 63.
119 *See*, e.g., the protocol in the *Everfresh* case, *supra* note 41.
120 *See* UNCITRAL, *Practice Guide*, *supra* note 6\, at para. 81.

The treatment of intercompany claims deserves special mention because, in addition to the issues indicated above, it also raises the problem of whether these claims can be substantively consolidated under the applicable domestic law. This issue was at the heart of the protocol adopted in the *Lehman Brothers* case, which provided for the establishment of a special committee composed of all bankruptcy representatives charged with the reconciliation of the complex web of intercompany claims of the financial group.[121] However, not many protocols have dealt with this issue probably because an agreement between court representatives on intercompany claims may negatively affect other creditors, which could in turn seek court redress leading to the a stop in the parallel proceedings.

Finally, almost all bankruptcy protocols include dispositions on the retention of professionals and on the treatment of costs and expenses of the proceedings, including the debtor's representative's fees. The approach generally followed allocates competence to each court for the determination and payment of costs and expenses incurred in the course of its procedure.[122] This allows for a significant level of deference and comity, in that it restricts a foreign court from interfering in the peer court's management of the case at the administrative level. However, in some rare cases, parties have agreed that certain expenses shall be paid out of the proceeds from the parallel bankruptcy proceeding.[123]

II. Court-to-Court Protocols as a Common Law Procedural Device

The previous part of the present paper has been devoted to providing an overview of the phenomenon of cross-border bankruptcy protocols, by taking into account their historical development, and their main common legal features. This part will examine the role played by the traditional divide between common law[124] (in particular, U.S.) and civil law legal systems with respect to bankruptcy protocols. This section aims to provide some considerations which might be helpful in addressing the issue—to be discussed *infra* in Part III—of the considerable reluctance of civil law countries towards the adoption of bankruptcy protocols.

1. The legal basis for the adoption of bankruptcy protocols in the U.S.

As shown in the overview of the history of bankruptcy protocols in Part I *infra*, their use until recent years had been confined almost exclusively to common law jurisdictions, in particular, the U.S.,

[121] *See*, e.g., the protocol in the *Lehman Brothers* case, *supra* note 56.
[122] *See,* e.g., the protocols following the *Loewen* model, *supra* note 46.
[123] *See*, e.g., the *SENDO* protocol, *supra* note 63.
[124] A discussion on the common law courts' attitude towards judicial cooperation is provided by Paul J. Omar, *Co-operation between Courts: The Common Law Legacy*, Insolvency Lawyer 74 (2003).

U.K., and Canada. Indeed, the development of protocols in the modern era was made possible by the wide degree of discretionary powers traditionally enjoyed by U.S. bankruptcy courts in the management of their cases. This can be demonstrated by an analysis of the legal basis supporting the adoption of protocols.

As noted above,[125] § 1527(4) of the U.S. Bankruptcy Code currently provides explicitly that cooperation in cross-border cases "may be implemented by any appropriate means, including: […] (4) approval or implementation of agreements concerning the coordination of proceedings." This section of the Code reproduces Article 27(d) of the UNCITRAL Model Law. As stated by the leading U.S. commentary of the Code, "none of [the suggestions in § 1527] are novel in the United States, and all can be found in various reported decisions and protocols approved in cases."[126] This was also acknowledge by the U.S. Congress during the enactment of § 1527, when it was noted that "United States bankruptcy courts already engage in most of the forms of cooperation described [in § 1527], but they now have explicit statutory authorization for acts like the approval of protocols of the sort used in cases."[127]

Indeed, prior to the enactment of § 1527(4), courts usually approved protocols by means of succinct orders, which lacked a thorough analysis of the legal basis for their approval. In these orders, however, courts generally identified §§ 105(a) and 363(b) of the Bankruptcy Code as the appropriate basis for the approval of bankruptcy protocols.[128]

Pursuant to § 105(a) of the Bankruptcy Code, a court "may issue any order, process or judgment that is necessary or appropriate to carry out the provision of […] title [11]." This provision is traditionally regarded as "an omnibus provision phrased in such general terms as to be the basis for a broad exercise of powers in the administration of a bankruptcy case"; its "basic purpose [...] is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid at at the exercise of their jurisdiction."[129] This provision is the modern translation of the general equitable powers conferred upon the bankruptcy judges under the common law. Indeed, § 105(a) is usually invoked by bankruptcy courts as the legal basis for any decisions on the administration of the case—including those not explicitly permitted by the Bankruptcy Code[130]—including, thus, the approval of protocols.

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[125] *See supra* pp. 9–10.
[126] 8 COLLIER ON BANKRUPTCY ¶1527.01 (Alan N. Resnick & Henry J. Sommers eds., 16th ed.).
[127] H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 117 (2005).
[128] *See, e.g*, Order Approving The Proposed Cross-Border Insolvency Protocol For The Lehman Brothers Group Of Companies*,* Case No. 08-13555 (Bankr. S.D.N.Y., June 17, 2009).
[129] Casse v. Key Nat'l Bank Ass'n *(In re Casse),* 198 F.3d 327, 336 (2d. Cir. 1999).
[130] *See*, e.g., *In re* Cooper Props. Liquidating Trust, Inc., 61 B.R. 531, 537 (Bankr. W.D. Tenn. 1986).

In addition, (§ 363(b)(1) of the Bankruptcy Code provides that "the trustee, after a notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." This provision has formed the basis for a wide spectrum of transactions performed by the trustee outside the ordinary course of business, including, chiefly, the sale of the debtor's business.[131] In exercising his powers under § 363, the trustee (or the debtor in possession) must base the contemplated transaction upon his sound business judgment: indeed, "where the debtors articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct."[132]

Hence, §§ 105(a) and 363(b) of the Bankruptcy Code provide, respectively, the court and the trustee (or the debtor in possession) with wide and almost unlimited discretionary powers relating to the administration of the bankruptcy case. These sections have formed the legal basis for the adoption of bankruptcy protocol by U.S. courts before the enactment in 2005 of § 1527(4) of the Bankruptcy Code, which now explicitly authorizes the approval of protocols.

2. The U.S. legal attitude supporting the adoption of bankruptcy protocols.

Although the provisions of the Bankruptcy Code identified above form the basis for the exercise of discretionary powers for the approval of bankruptcy protocols, the general U.S. legal attitude towards transnational litigation cannot be considered irrelevant for the purposes of understanding the development of bankruptcy protocols. Indeed, some of the major clashes between U.S. and European jurisdictions in the context of cross-border litigation have arisen as a consequence of the use of certain common law doctrines generally unknown in Europe, notably, the notion of extraterritorial application of U.S. law, the reasonableness test as a basis for U.S. personal jurisdiction over foreign parties, and the doctrine of *forum non conveniens*.[133]

An examination of these doctrines goes beyond the scope of this paper. However, it should be emphasized that these doctrines share common features that are relevant for our purposes. Firstly, they all address the reach of U.S. jurisdiction, either to prescribe or to adjudicate. Secondly, they all require U.S. courts to exercise a certain degree of discretion in the determination of whether U.S. jurisdiction

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131 *See,* e.g., *Comm. Of Equity Sec. Holders v. Lione Corp. (In re* Lionel Corp.*),* 722 F.2d 1063 (2d Cir. 1983); *Institutional Creditors of Cont'l Airlines, Inc. v. Cont'l Airlines, Inc. (In re* Cont'l Airlines, Inc.*)*, 780 F.2d 1223 (5th Cir. 1986) and, more recently, *In re* General Motors Corp., 407 B.R. 463 (Bankr. S.D.N.Y. 2009) and *In re* Chrysler LLC, 405 B.R. 79 (Bankr. S.D.N.Y. 2009).

132 *In re* Johns-Manville Corp., 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

133 For a general discussion of these topics, *see* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION (Thimpson West, 3rd ed. 2006).

can be established.

Extraterritorial jurisdiction to prescribe concerned the applicability of U.S. law to conduct and/or effects not occurring within the territory of the U.S. The approach generally followed by the courts[134] is the one set forth in §§ 402–3 of the Restatement (Third) of Foreign Relations, pursuant to which a state generally has jurisdiction to prescribe with respect to conduct taking place or having substantial effect in its territory.[135] This, however, is then limited by the Restatement: "Even when one of the bases for jurisdiction […] is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state, when the exercise of such jurisdiction is *unreasonable*."[136] The reasonableness inquiry, as foreseen by the Restatement, turns on a number of factors, including the extent to which the activity takes place in the U.S. territory, the connection (nationality, residence, etc.) of the parties involved, the character of the activity regulated, the extent to which another state may have an interest in regulating such activity, and the likelihood of conflict with a foreign regulation.[137]

Extraterritorial application of domestic bankruptcy law is obviously one of the primary issues in the context of cross-border bankruptcy proceedings.[138] This is also due to the close interrelation between this doctrine and the principle of comity, which is often referred to by U.S. bankruptcy courts in adjudications on various issues arising in these proceedings.[139] Although it is not possible to examine in greater detail how the doctrine of extraterritoriality is applied in the context of bankruptcy litigation, it should suffice to mention that the crux of the debate relates to the interpretation of the statutory language provided by § 541 of the Bankrutptcy Code, which states that an "estate is comprised of […] property, *wherever located*" (emphasis added). While this provision has been cited

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134 *See,* e.g., *Hartford Fire Insurance Co. v. California,* 509 U.S. 764 (U.S.1993), *Societe Industrielle Aeropostale v. District Court*, 482 U.S. 522 (U.S. 1987) and *F. Hoffman-La Roche Ltd. v. Empagran S.A. et al.*, 542 U.S. 155 (U.S. 2004).

135 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §402(1).

136 *Id.*, §403(1) (emphasis added).

137 *Id.,* §403(2)

138 For a recent discussion *see Development in the Law—Extraterritoriality,* 124 HARV. L. REV. 1226, 1292 *et seq.* (2011) and T. Brandon Welch, *The Territorial Avoidance Power of the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 553 (2008).

139 *See, e.g.*, *In re* Maxwell Communication Corporation plc et al., 170 B.R. 800 (Bankr. S.D.N.Y. 1994); Stonington Partners Inc., v. Lernout &Hauspie Speech Products, 310 F.3d 118 (3d. Cir. 2002); *In re* United Pan-Europe Communications N.V., 2003 U.S. Dist. LEXIS 1297 (Bankr. S.D.N.Y. 2003), *aff'd* (S.D.N.Y. 2004); Stonington Partners Inc. v. Lernout & Hauspie Speech Products, 310 F.3d 118 (3d. Cir. 2002). As pointed out by Professor Westbrook, *Hilton v. Guyot,* the seminal U.S. case on the comity doctrine was an insolvency case. *See* Jay L. Westbrook, *International Judicial Negotiation*, 38 TEX. INT'L. J. 567 (2003). The role of comity in insolvency cases is discussed in a greater length by A. Briggs, *The Principle of Comity in Private International Law*, 354 Receuil des Cours: Collected Courses of the Hague Academy of International Law 65 (2012).

by some courts[140] as a basis for extraterritorial application of U.S. bankruptcy law, in order to determine whether U.S. bankruptcy law should be applied extraterritorially, U.S. courts have generally applied the reasonableness test prescribed by the Restatement.

Similar considerations are also true with respect to the issue of establishing U.S. personal jurisdiction over foreign entities. Here again, as has been clarified by the U.S. Supreme Court in an important line of cases,[141] the assertion of U.S. personal jurisdiction generally implies the exercise of a reasonableness test:

> "The determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interest of the forum State and the plaintiff's interest in obtaining relief. It must also weigh in its determination the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in furthering fundamentals substantive social policies."[142]

This doctrine as elaborated by the Court is not directly applicable to bankruptcy cases, which are subject to federal bankruptcy law and not the state statutes regulating "long-arm" jurisdiction. However, the reasonableness principle embedded therein is also relevant for bankruptcy jurisdiction. Personal jurisdiction for bankruptcy purposes is to be determined pursuant to 28 U.S.C. § 1334, under which "[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction: (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."[143] But the same provision reiterates the observations made above with respect to comity and reasonableness with regards to the assertion of jurisdiction over a foreign defendant and specifically contemplates the possibility that "a district court in the interest of justice, or *in the interest of comity* with State courts or respect for State law, [may] abstain[] from hearing a particular"[144] bankruptcy case. Accordingly, in deciding whether to assert bankruptcy jurisdiction over foreign debtors, U.S. courts are required to undertake a legal analysis, in which discretionary considerations involving comity and reasonableness are taken into account.[145]

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[140] *See, e.g.*, French v. Liebmann *(In re* French*)*, 440 F.3[rd] 145 (4[th] Cir. 2006) and *In re* Gucci, 309 B.R. 679 (S.D.N.Y. 2004). *Contra see In re* Midland Euro Exch. Inc., 347 B.R. 708 (Bankr. C.D. Cal., 2006)

[141] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, (1980); Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102, (1987).

[142] Asahi Metal Industry Co., Ltd. v Superior Court, 480 U.S. 102, (1987).

[143] 28 U.S.C. §1334(e).

[144] 28 U.S.C. §1334(c) (emphasis added).

[145] A notable example of this approach can be found in *In re* Yukos Oil Company*,* 321 B.R. 396, (Bankr. S.D.Tex. 2005), in which the court declined its bankruptcy jurisdiction over a Russian oil company based on a blend of consideration

Finally, the doctrine of *forum non conveniens* shares some of the main features of the above-examined legal theories, most notably, the discretionary assessment that a court should perform in asserting its jurisdiction. This doctrine authorizes the dismissal of an action pending before a U.S. court in order that the case be brought in another, more appropriate venue. In one of the leading cases, the U.S. Supreme Court clarified that "the *forum non conveniens* determination is committed to the sound discretion of the trial court," which is required to "consider all relevant public and private interest factors" in a reasonable way.[146] These factors include the connections between the lawsuit and the forum state, the burden that the parties would suffer in case of transfer of the case to another forum, and the availability of witnesses and evidence.[147] The doctrine of *forum non conveniens* has sometimes been applied by U.S. courts in the context of bankruptcy cases,[148] which, then, have discretionally balanced the factors indicated by the Supreme Court in order to determine whether it was appropriate to decline bankruptcy jurisdiction.

Although these doctrines have never been explicitly invoked by U.S. bankruptcy courts in order to establish a legal basis for the approval of bankruptcy protocols, such approval is conceptually premised upon the exercise of the same discretionary power that are predicated by these doctrines.

As noted above, protocols represent a tool for avoiding jurisdictional conflicts with respect to certain issues arising out in the context of cross-border bankruptcy proceedings. Although they often employ the formal language of recognition, in practice they rely upon a bargaining process performed by the parties on an *ad hoc* basis. In other words, in approving protocols bankruptcy representatives and courts determine on a case-by-case basis the conditions that allow the orderly and coherent conduct of the cross-border bankruptcy case. Such a determination is premised upon the recognition of the interests of the counter-parties and is arranged as a bargain, in which parties relinquish some claims in exchange for certain benefits. This arrangement inevitably involves discretionary considerations with respect to the extraterritorial application of bankruptcy law, establishment of personal jurisdiction over foreign debtors or creditors, and appropriateness of the forum. Thus, even though the doctrines mentioned above are not expressly mentioned by courts, they provide the cultural and legal substrate permitting to U.S. courts to engage is this kind of considerations in the context of approval of bankruptcy protocols.

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including international comity, sovereign immunity, and *forum non conveniens*.

146 Piper Aircraft Co. v. Reyno, 454 U.S. 235, (1981); *see also* Gulf Oil Corp. v. Gilbert, 440 US. 501 (U.S. 1947).

147 *See* LOWENFELD, *supra* note 133, at 301.

148 *In re* Yukos Oil Co., 321 B.R. 396, (Bankr. S.D. Tex. 2005); *In re* Xacur, 219 B.R. 956 (Bankr. S.D. Tex. 1998); Baumgart v. Fairchild Aricraft Corp., 981 F.2d 824 (5th Cir. 1993).

III. The Use of Protocols in Civil Law Jurisdictions

From the historical overview of the developments of bankruptcy protocols and the analysis of their legal basis and of the attitudes of courts in common law jurisdictions (in particular, the U.S.) supporting their use in cross-border insolvency cases, it should be now clear that protocols have been shaped mainly by common law educated and trained practitioners (judges, bankruptcy trustees and attorneys). The purpose of this section is to draw some conclusions on the use of bankruptcy protocols in civil law jurisdictions.

1. Some observations on the use of protocols in civil law jurisdictions.

As noted above,[149] bankruptcy protocols were first employed in the context of parallel insolvency proceedings between common law jurisdictions, especially the U.S., U.K., and Canada. However, even prior to the enactment of the provisions in the UNCITRAL Model Law and the E.U. Regulation, which expressly provide a legal basis for adoption of protocols, the use of protocols was not totally unknown in civil law jurisdictions. However, from both a qualitative and a quantitative perspective, the use of bankruptcy protocols in civil law jurisdictions is substantially less significant than their use in common law legal systems.

Starting from quantitive data, the historical overview provided above has shown that the number of protocols adopted by courts in common law jurisdictions greatly exceeds the number of those adopted by courts in civil law jurisdictions. Indeed, assuming that all relevant protocols have been publicly reported, those adopted by continental European civil law jurisdictions since 1998 to date are not more than five.[150] This figure does not include the French-Italian Protocol, which, as discussed, in more similar to a soft-law instrument, and is not intended to be applied to a specific bankruptcy case.

On the contrary, since the *Maxwell* case approximately 35 bankruptcy protocols were adopted in common law jurisdictions, i.e, seven times the number of those adopted by European civil law countries. Moreover, as noted above,[151] civil law courts have often proven incapable of adopting protocols with their common law homologues, due to the irreconcilability of the parties' positions: although traces of such incapability have been reported with respect to three cases,[152] they might have

[149] *See supra* Part One, para. 1.
[150] *See supra* Part One, para 1(e) and UNCITRAL, *Practice Guide*, *supra* note 61, at paras 34-5.
[151] *See supra* Part One, para 1(e).
[152] *See supra* Part One, para 1(e). The cases are *Lernout & Hasupie Speech Product* (U.S. - Belgium), *Collins & Aikman* (U.K. - Spain – Germany) and *United Pan-Europe* (U.S. - The Netherlands).

occurred more often.

Turning to qualitative data, of the five protocols adopted by continental European countries, four[153] were enacted in the context of intra-European insolvency proceedings governed by the E.U. Regulation, and only one was entered into by the a civil law jurisdiction, on one side, and a U.S. court, on the other side. The differences between these two groups of protocols are striking.

While the U.S.-Swiss protocol approved in the *AIOC* case closely resembles the contemporary protocols approved in U.S.-Canadian or U.S.-U.K. bankruptcy cases, those stipulated in the framework of E.U. Regulation demonstrate a completely different approach. As discussed above,[154] the *AIOC* protocol, *inter alia,* established joint jurisdiction of the two courts over the debtors' assets, provided for cross-recognition of creditors' claims filed in the other proceeding, and set forth a special procedure to treat certain claims filed by the main creditors. In other words, the purpose of the *AIOC* protocol was to construct from scratch a normative structure through which to support cross-border cooperation between two courts, which were not otherwise bound by any supranational legal instruments on judicial cooperation in bankruptcy matters.

On the contrary, the intra-E.U. Protocols merely seek to supplement the existing, mandatory normative framework for cooperation contained in the E.U. Regulation. Accordingly, recalling the distinction drawn between substantive and procedural matters, intra-E.U. protocols not only do not address any substantive matters, but they also evince a much less incisive attitude towards procedural matters than that usually adopted by common law courts. In particular, these protocols do not contain any dispositions dealing with jurisdictional issues, either in the form of an identification of a set of criteria governing the assertion of jurisdiction or in the form of an allocation of responsibilities for the performance of the envisaged transactions. Instead, as discussed above,[155] intra-E.U. protocols generally address only minor procedural issues, such as the method for giving notice to foreign creditors, the procedure for verification of claims filed abroad, and the opening of secondary proceedings pursuant to the E.U. Regulation.

2. Conclusions: the attitude of civil law courts towards bankruptcy protocols.

One may identify multiple causes for the major differences in structure, function, contents and objectives between protocols adopted by common law jurisdictions and those adopted by civil law

[153] Protocols in the *Swissair, Sendo,ISA-Daisytech* and *EMTEC* cases. *See* UNCITRAL, *Practice Guide*, *supra* note 61, at paras. 115-40.

[154] *See supra* note 49.

[155] *See supra* Part One, para 1(e).

countries. However, these causes arguably may be divided into two different categories, namely the legal context in which courts adopting protocols operate and the powers to administer the case that these courts have.

First, with respect to the legal context, it is important to underscore that, as discussed below, the approach towards cross-border insolvency cooperation adopted by the E.U. Regulation differs significantly from that adopted by both the UNCITRAL Model Law and, in general, by common law countries. Indeed, although both pieces of international legislation aim at establishing a hybrid model of cross-border insolvency, the Model Law leaves much more space to court discretion. As noted above, under the Model Law, courts have broad discretion in granting bankruptcy relief to representatives of foreign proceedings. This discretion is limited by the possible sole exception of the recognition of representatives of a foreign main proceeding, to whom the court must grant the relief enumerated by the Model Law. Moreover, with respect to the specific issues of court cooperation and coordination with foreign proceedings, the Model Law invites the parties to cooperate "to the maximum extent possible" (Articles 25–26) and to adopt "any appropriate means" (Article 27), thereby adopting a discretion-based approach, as opposed to a rules-base one.

On the contrary, the framework for cooperation established by the E.U. Regulation include scant reference to the discretion of courts in bankruptcy matters. Instead, the E.U. Regulation sets forth a complex set of procedural rules dealing with all issues potentially arising from cross-border proceedings, including the definition of the jurisdictional scope of the courts involved, the applicable law, the the powers of the bankruptcy representatives, the rights of the creditors of the main and the local proceedings, and how these proceedings are to be coordinated.[156] In particular, as noted above,[157] while Article 27 of the Model Law sets forth an obligation to cooperate with courts and bankruptcy representatives and illustrates the means through which such cooperation should be ensured (including protocols), no similar provision exists in the E.U. Regulation, which only imposes upon courts and representatives a generic duty to cooperate "with each other" (Article 31).

These variances allow the conclusion that the Model Law has adopted a discretion-based approach, and the E.U. Regulation a rule-based one.[158] The latter rule-based approach may suffer from

[156] Possibly the sole provision in the E.U. Regulation establishing a discretion-based rule is Article 33, which authorizes the competent court to stay a secondary proceeding upon request of the representative of the main proceeding in order to permit to the latter to complete the collection of assets and claims in the main proceeding without interference from the secondary one.

[157] *See supra* pp. 9-10.

[158] For a classic analysis of this dichotomy *see* Louis Kaplow, *Rules* Versus *Standards: An Economic Analysis*, 42 Duke L. J. 557 (1992); Eric A. Posner, *Standard, rules and social norms,* 21 HARV. J. L. & PUB. POL'Y 102 (1997-1998).

some notable inconveniences, including being over-comprehensive and not sufficiently flexible to address the specificities of each case. However, it offers the advantage of minimization of the *ex ante* uncertainties associated with the cross-border proceeding. Moreover, it reduces the need for the parties to establish coordination rules on a case-by-case basis, since these rules are in great part already set forth by the E.U. Regulation itself.

This consideration partially explains why protocols are so often used in the context of the UNCITRAL Model Law (or in a context where no supranational law on cross-border insolvency exists at all), while they are so neglected within the framework of the E.U. Regulation. Moreover, it also explains the differences in contents between protocols adopted in the U.S. and those approved by continental European courts. Indeed, while in the Model Law context protocols may serve as a device for exercising the discretionary powers granted by the applicable legislation, in the E.U. Regulation, which minimizes the importance of discretion and mandates the application of fixed rules on coordination, no such necessity is present, and, thus, the need for protocols is reduced.

Thus, the main function of protocols adopted in the E.U. Regulation is to fix the rigidities deriving from the use of a rule-based approach, rather to exercise discretionary powers. In fact, European protocols generally either provide an interpretation of certain dispositions in the E.U. Regulation that are perceived as ambiguous or seek to supplement the provisions that are deemed too general. Significantly, European parties generally also use protocols to exercise the select discretionary powers entrusted by the Regulation, e.g., in order to agree on methods of giving notice to the foreign parties and to regulate the exercise of the right of the main proceeding's representative to request a temporary stay of local proceedings.

However, the rule-based approach adopted by the E.U. Regulation is not sufficient to explain the scarce use of bankruptcy protocols by continental European courts. Indeed, while the first U.S. protocols were adopted from 1992 onwards, the E.U. Regulation had not at that point been enacted; thus, the pre-2000 continental Europe normative framework on cross-border bankruptcy proceedings was comparable to the U.S. Therefore, one must look outside of the current E.U. normative framework to find other causes that explain the divergence in use of protocols.

One significant additional cause may be found in the legal attitude of courts. As noted above, the approval of protocols in the U.S. has been premised upon the exercise of the general equitable powers for the administration of the case granted by § 105 of the Bankruptcy Code to the courts, and the business-judgment discretionary powers entrusted by § 363(b) of the Code to the trustee; moreover, certain traditional common law doctrines (such as the extraterritorial application of domestic law, the reasonableness test for establishing personal jurisdiction, and *forum non conveniens*) may have also inspired a general willingness to bargain in the U.S. parties dealing with bankruptcy jurisdictional issues.

Unlike common law courts, bankruptcy courts in civil law jurisdictions usually do not have general equitable powers in administering the case; on the contrary, their authority depends on what is permitted by the applicable law. In other words, civil law courts and bankruptcy representatives generally need to find an appropriate statutory authorization to exercise discretionary powers, since creditors or other stakeholders involved in the insolvency process may be negatively affected by an unregulated use of those powers. In particular, the consideration for the creditors' interests may prevent courts and bankruptcy representatives from entering into protocols that could indirectly modify the legal entitlements of the creditors and, thus, negatively affect their interests. Indeed, it is interesting to note that in the case of one of the most relevant protocols entered into in a continental European jurisdiction, a German court expressly conditioned the effectiveness of the agreement on its approval by the creditors.[159]

Some commentators have attempted to identify civil law legal principles bearing the same content of §§ 105 and 363 of the U.S. Bankruptcy Code. In particular, according to some authors, protocols would fall within the insolvency representatives' statutory competence to protect and maximize the value of the estate.[160] Hence, in order to fulfill this duty, the bankruptcy representative would be entitled to adopt all necessary measures, including the approval of a bankruptcy protocol. Although this suggestion is extremely interesting, it should be recalled that in civil law jurisdictions, courts and representatives are required to fulfill their duties, including the duty to maximize the debtor's estate, by adhering to the procedures established by the law, and by refraining from exercising discretionary evaluation in the absence of an express statutory provision.

Moreover, civil law courts generally approach issues of jurisdiction in a substantially different fashion. Jurisdiction of civil law courts can never be established based on discretionary considerations and instead always requires an appropriate statutory basis. Accordingly, the U.S. jurisdictional doctrines described *supra* in Part X are completely foreign to courts in continental Europe. The European Court of Justice has even declared that the *forum non conveniens* doctrine is incompatible with the existing European normative framework, in particular stating that "the Brussels Convention

[159] This occured in the *ISA-Daisytek* case, reported in UNCITRAL, *Practice Guide*, *supra* note 61, at para. 123.
[160] *See id.* at 34; WESSELS, MARKELL & KILBORN, *supra* note 3, at 105.

precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action."[161]

As noted above, U.S.-style protocols are generally premised upon an implicit bargaining process, in which parties renounce assertion of bankruptcy jurisdiction over certain assets or claims in order to achieve an expedite and efficient outcome of the case. Since, for the reasons identified above, this approach is not only impermissible absent an expressly statutory basis, but also an unconceivable attitude for civil law courts or bankruptcy representatives, bankruptcy protocols entered into by the latter cannot reflect an exercise of discretionary powers, and, thus, tend merely to supplement or interpret the existing normative framework

[161] Owusu v. Jackson, Case C-281/02 (Europe Court of Justice, 2005).